Supreme Court, U.S.
FILED
DEC 1 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-929

IN THE

Supreme Court of the United States

October Term, 1988

JOSEPH ROBICHAUD AND CITIZENS IN SUPPORT OF ATTLEBORO MALL,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

DANIEL J. POPEO
PAUL D. KAMENAR*

WASHINGTON LEGAL FOUNDATION
1705 N Street, N.W.
Washington, D.C. 20036
(202) 857-0240

**Counsel of Record*

Date: December 1, 1988

CASILLAS PRESS INC. – 1717 K ST NW WASHINGTON DC 20036 – 223-1220

30 pp

QUESTION PRESENTED

Whether the Second Circuit ignored the plain meaning of Section 404(c) of the Clean Water Act by allowing the Environmental Protection Agency to exceed its statutory authority when it vetoed a fill permit on the basis of the state or condition of wetlands regionally or nationwide rather than basing its decision on the environmental effects solely at the specific proposed site in question as required by Section 404(c) and as Congress intended?

LIST OF PARTIES

Petitioners, Joseph Robichaud and Citizens in Support of Attleboro Mall, intervened as plaintiffs-appellants below. Government respondents, United States Environmental Protection Agency, United States Army Corps of Engineers, Lee Thomas, in his official capacity as Administrator of the United States Environmental Protection Agency, Richard K. Dawson, in his official capacity as Assistant Secretary for Civil Works, United States Army, and Jennifer Joy Wilson, in her official capacity as Assistant Administrator for External Affairs, United States Environmental Protection Agency, were defendants-appellees below. Respondents, Sierra Club, Environmental Defense Fund, National Wildlife Federation, National Audubon Society, Conservation Law Foundation of New England, Inc., Massachusetts Audubon Society, Citizens for Responsible Environmental Management, Massachusetts Society for Conservation Professionals, Audubon Society of Rhode Island, Rhode Island Association of Conservation Commissioners and Natural Resources Defense Council intervened as defendants-appellees on behalf of government respondents in the courts below.

The Home Building Association of Massachusetts intervened on behalf of respondents Bersani, *et al.*, in the district court but did not appear as a party in the Second Circuit.

Respondents John A. Bersani, Newport Galleria Group, Robert J. Congel, and the Pyramid Companies were plaintiffs-appellants below and have filed a separate petition for writ of certiorari in this Court on the same day as this petition was filed.

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	i
LIST OF PARTIES	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
STATUTES AND REGULATIONS INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	6
THE SECOND CIRCUIT IGNORED THE PLAIN MEANING OF SECTION 404(C) OF THE CLEAN WATER ACT WHICH LIMITS THE EPA'S AUTHORITY TO DENY A FILL PERMIT ON THE BASIS OF ENVIRONMENTAL EFFECTS OF A DISCHARGE AT THE PROPOSED SITE IN QUESTION RATHER THAN AT UNRELATED SITES, THEREBY VIOLATING BASIC RULES OF STATUTORY CONSTRUCTION AND CONCOMITANTLY, ALLOWING THE EPA TO EXCEED ITS STATUTORY AUTHORITY	6
CONCLUSION	13

TABLE OF AUTHORITIES

CASES	PAGE
Amoco Production Co. v. Village of Gamell, Alaska, 107 S. Ct. 1396 (1987)	11, 12
Chevron, U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984)	8, 9,10
Manchester Environmental Coalition v. Enironmental Protection Agency, 612 F.2d 56 (2d Cir. 1979)	10
McMahon v. Califano, 605 F.2d 49 (2d Cir. 1979)	11
Middle South Energy, Inc. v. F.E.R.C., 747 F.2d 763 (D.C. Cir. 1984)	9
Moore v. Harris, 623 F.2d 908 (4th Cir. 1980)	11
State of Connecticut v. EPA, 696 F.2d 147 (2d Cir. 1982)	11
Transbrasil S.A. Linhas v. Dep't of Transp., 791 F.2d 202 (D.C. Cir. 1986)	11
TVA v. Hill, 437 U.S. 153 (1978)	10
United States v. Perdue Farms Inc., 680 F.2d 277 (2d Cir. 1982)	11
Statutory and Regulatory Provisions	
Administrative Procedures Act	
5 U.S.C. 706(2)(A)	7
5 U.S.C. 706(2)(C)	7
28 U.S.C. 1254(1)	2

TABLE OF AUTHORITIES --Continued

	PAGE
Clean Water Act	
33 U.S.C. 1344(c)	*passim*
Clean Air Act	
42 U.S.C. 7410(a)(5)(A)(iii)	10
40 C.F.R. 230.10(a)	2
Final Determination of the EPA's Assistant Administrator For External Affairs Concerning The Sweedens Swamp Site	2, 4, 5, 6

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners, Joseph Robichaud and Citizens in Support of Attleboro Mall, who were intervenor-appellants below, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit, entered in this proceeding on June 8, 1988, rehearing and suggestion for rehearing *en banc* denied, September 2, 1988. Petitioners also support the petition for certiorari filed by respondents John A. Bersani, *et al.*, and suggest that these two petitions be consolidated.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit, with the dissenting opinion of Judge Pratt, is reported at 850 F.2d 36 (2d Cir. 1988), and reproduced in the Appendix annexed to the Petition for Writ of Certiorari filed by John A. Bersani, *et al.*, who were the appellants below. App. A. The Order of the United States Court of Appeals for the Second Circuit, denying Petitioners' Petition for a Rehearing and Suggestion for Rehearing En Banc, dated September 2, 1988, is not reported and is reproduced in Respondent Bersani's Petition as App. D at 109a. The opinion of the United States District Court for the Northern District of New York, is reported at 674 F. Supp. 405 (N.D.N.Y. 1987) and reproduced as App.

B at 32a. The Final Determination of the Assistant Administrator for External Affairs, United States Environmental Protection Agency, Concerning the Sweedens Swamp Site in Attleboro, Massachusetts Pursuant to Section 404(a) of the Clean Water Act ("Final Determination"), dated May 13, 1986, is not reported but is reproduced as App. C at 64a.

JURISDICTION

The date of the opinion sought to be reviewed was June 8, 1988. The Second Circuit denied Petitioners' petition for rehearing on September 2, 1988. Jurisdiction is conferred on this Court by 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

The relevant statutory provision, Section 404 of the Clean Water Act ("the Act"), 33 U.S.C. 1344, and regulatory provision, 40 C.F.R. 230.10(a), are reproduced in the Appendix as App. E to the petition for certiorari filed by John A. Bersani, *et al.*

STATEMENT OF THE CASE

In the interest of judicial economy, petitioners adopt by reference the Statement of the Case set forth in the petition for writ of certiorari filed by respondents John A. Bersani, *et al.*, on whose behalf petitioners intervened below. Nevertheless,

petitioners wish to emphasize certain facts as they relate to the question presented.

John A. Bersani and The Pyramid Companies ("Pyramid") propose to build a shopping mall in Attleboro, Massachusetts on land which they own. As the administrative record demonstrates, the proposed shopping center would be a significant economic boon for the citizens of Attleboro and the economically depressed region. It would create 1,500 construction jobs and some 2,250 permanent part-time and full-time jobs. Over $500,000 in municipal tax revenues would be generated each year and some $25,000,000 would be added to the regional economy annually. This mall is enthusiastically supported by the overwhelming majority of the citizens of Attleboro, whose views in this case are represented by petitioners Citizens in Support of Attleboro Mall and its Chairman Joseph Robichaud.

Not only would the mall provide a much needed economic stimulus to Attleboro and the region, the proposed project would also enhance the aesthetics of the area by filling in 32 acres of Sweedens Swamp, the proposed site of the mall, and *enhancing* 13 additional acres of the swamp. Four acres of the swamp will be left undisturbed. Nine acres of upland will be excavated to create wetlands on site. *See* District Court opinion at App. 38a.

As petitioners and other residents of Attleboro have long known, Sweedens Swamp is a wetland in name only, classified that way only because of the presence of some red maple trees. In point of fact, the so-called "wetlands" is dry most of the year. The swamp is highly degraded, the victim of years of unauthorized, illegal dumping of solid waste. The swamp is *isolated* and neither feeds into any other stream or river, nor connects to any other wetland. A walking tour of the swamp reveals a burial ground for animals, decaying tires,

refrigerators, roofing shingles and other debris. *See* District Court Opinion at App. 42a. To the residents of Attleboro, who have complained about the swamp for years, Sweedens Swamp is a degraded eyesore, nothing more than a breeding ground for mosquitoes and of use only to the teenagers who go there to drive dirt bikes, drink, and experiment with drugs. In sum, Sweedens Swamp as it presently exists is a highly degraded, highly inefficient wetlands which fails to perform most of the ecological or recreation benefits which make wetlands worth preserving.

In addition to extensive on-site mitigation, Pyramid informed the U.S. Army Corps of Engineers, the permitting authority, that it would construct over 35 acres of diverse, productive wetlands on an off-site parcel of land which presently is of very low ecological value. Thus, in addition to improving the wildlife habitat which will be provided in the 26 acres of enhanced wetland which will remain after construction, Pyramid has agreed to create an *additional* 36 acres of wildlife habitation consisting of open water, marsh meadow, and shrub swamp. The off-site wetlands to be created by Pyramid will cost the company several million dollars to construct. Pyramid has agreed to post a performance bond, and if required by EPA, would construct the off-site wetlands *before* undertaking to build the mall. EPA Final Decision at App. 100a-101a.

The Corps found that Pyramid's off-site wetlands creation plans would result in a substantial improvement in overall wildlife habitat for the area. The Corps noted that Sweedens Swamp is a red maple swamp, a very common wildlife habitat in Massachusetts. By contrast, the open water, marsh meadows and shrub swamp to be created by Pyramid is a relatively rare type of habitat in the Northeast. As a result, the off-site wetlands will attract animals whose presence in Massachusetts is limited severely by available habitat.

On balance, after exhaustively analyzing the degraded state of Sweedens Swamp and the millions of dollars of improvements to be made by Pyramid, both on-site and off-site, the Corps finally concluded that Pyramid's purported project would result in a net *benefit* to the environment by an order of magnitude of 1 1/2 to 1. The Corps found that Pyramid's proposal would result in a more efficient, functioning wetlands that would actually clean the water entering it, provide meaningful fisheries habitat, and provide for rarer and more endangered wildlife.

Nevertheless, the Administrator of the Environmental Protection Agency, acting through the Assistant Administrator for External Affairs, issued a Final Determination, the effect of which was to veto the proposed fill permit which the U.S. Army Corps of Engineers had carefully decided to issue to the developer. The purported basis for this veto was the EPA's determination that filling in the swamp would cause "unacceptable adverse effects" to the wildlife habitat at Sweedens Swamp.

While parroting the conclusory statutory language of Section 404(c) ("unacceptable adverse effects") in exercising its veto power, the EPA's basis or supporting reason for reaching that conclusion reveals that an important factor in its decision was the state or condition of wetlands other than at the site in question, namely, Sweedens Swamp. However, Congress limited the EPA's veto authority by requiring that it assess the environmental effects only at the site in question, rather than considering the condition of wetlands regionally or nationally.

The court of appeals essentially ignored this argument and merely stated without any explication in footnote one of its decision that the "EPA's decision as wholly within its authority." App. 5a, n.1.

REASONS FOR GRANTING THE WRIT

THE SECOND CIRCUIT IGNORED THE PLAIN MEANING OF SECTION 404(C) OF THE CLEAN WATER ACT WHICH LIMITS THE EPA'S AUTHORITY TO DENY A FILL PERMIT ON THE BASIS OF THE ENVIRONMENTAL EFFECTS OF A DISCHARGE AT THE PROPOSED SITE IN QUESTION RATHER THAN AT UNRELATED SITES, THEREBY VIOLATING BASIC RULES OF STATUTORY CONSTRUCTION AND CONCOMITANTLY, ALLOWING THE EPA TO EXCEED ITS STATUTORY AUTHORITY.

It is undisputed that the EPA denied the permit in question to the developer to fill in his own property to build a shopping mall at Sweedens Swamp on essentially two grounds. The EPA Assistant Administrator determined that because of:

> [1] the avoidability of the loss [of wildlife habitat] and[2] the *significance of such areas in Massachusetts, I conclude that filling Sweedens Swamp to build the proposed mall would have unacceptable adverse effects* within the meaning of Section 404(c).

EPA Final Decision at App. 107a. (emphasis added). It is also undisputed that EPA expressly regarded the alleged cumulative impact of losses at other unrelated wetland sites far away Sweedens Swamp as an "important" factor in denying the permit. *Id* at 106a. The Second Circuit, however, only addressede the first reason offered by the EPA for its veto of the permit and all but ignored the substantial arguments raised by petitioners as to why the EPA's consideration of the historical and cumulative losses of wetlands at other sites in Massachusetts and

around the country is contrary to the plain meaning of Section 404(c), 33 U.S.C. 1344(c). Consequently, the EPA acted "in excess of statutory jurisdiction, authority, and limitations ...." and its decision should have been set aside. 5 U.S.C. 706(2)(C). [1]

The lower court correctly noted in its decision that Section 404(c), 33 U.S.C. 1344(c) "is at the heart of the instant case." App. at 8a. That section, reproduced in footnote 3 of the panel's decision, App. 8a, states in pertinent part that the EPA administrator has the authority to deny or restrict the use of any *defined area*...as a disposal site, whenever he determines...that the discharge of such materials into *such area* will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas...wildlife, or recreational areas. (emphasis added).

Congress could not have made it clearer that by using the terms "defined area" and "such area," it intended that the EPA consider the environmental impacts of the discharge only at the site in question. The "defined area" has been defined as 49 acres of Sweedens Swamp. The term "such area" clearly

---

1 The panel, in footnote one of its decision, simply restated petitioners' statutory authority issue and held without any explanation "that EPA's decision was wholly within its authority...." App. 5a, n.1. As for petitioners' second argument, that the EPA's rejection of the developers mitigation efforts was "arbitrary and capricious" under 5 U.S.C. 706(2)(A), the panel at least gave a curt reason for its conclusion stating only that the EPA had a basis to believe that the mitigation efforts "were not likely to succeed." *Id.* While petitioners maintain that the lower court neglected to further determine whether the EPA's assignment of a *zero* chance of success to the mitigation efforts was arbitrary, especially in light of the fact that the developer offered to undertake the mitigation efforts *before* he began filling the swamp, we will nevertheless focus our petition on our first issue, *i.e.*, the lower court's failure to apply the plain meaning of the statute, since that is the more egregious error.

references the term "defined area." Accordingly, the Congress clearly *limited* the authority of the EPA to considering the environmental impacts at the site in question, rather than leaving it with open-ended and uncabined discretion to deny a permit simply because in its view, enough wetlands have been filled already at the national or regional level.

At oral argument before the Second Circuit, Judge William H. Timbers, who wrote the opinion, disparaged petitioners' argument that the EPA's authority is limited by the language Congress chose, characterizing it as a basic "law school" type argument, and one that he rejected in an earlier opinion he wrote but which he could not recall. To a certain extent, the other members of the panel similarly indicated at oral argument their belief that the EPA need not wear "blinders" and limit their assessment of the environmental impact to the site in question. Presumably, these views informed the court's unadorned and unexplained conclusion that the EPA "was wholly within its authority" in considering the cumulative impacts of *other* sites, rather than the site in question. App. 5a, n.1. This conclusion is clearly wrong and violates basic rules of statutory construction as enunciated by this Court on numerous occasions and even as recognized by Second Circuit in a major opinion written by Judge Timbers himself. This grave error must be corrected because it goes to the fundamental principles of separation of powers and the role of the federal courts in a democratic society, *i.e.*, whether courts are competent to make law and policy or whether that role is reserved wholly to the Congress.

As the Supreme Court stated in the leading case of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984):

> When a court reviews an agency's constuction of the statute which it administers, it is confronted with two

> questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, *that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress*....[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court [then, and only then] is whether the agency's answer [or reason for its decision] is based on a permissible construction of the statute.

Id. at 842-43 (emphasis added). The unambiguously expressed intent of the Congress in Section 404(c) is that the EPA administrator is limited to considering the impacts of the discharge at "such areas" which refers to the "defined areas," namely Sweedens Swamp. [2] If Congress wanted the EPA to consider the impact of discharges at other areas, Congress would not have used site-specific language. Since Congress *did* expressly address the issue, "that is the end of the matter" and neither the agency nor the lower court was free to re-write the statute. Consequently, there is simply no need to defer to the agency's expertise in deciding whether its construction of an ambiguous statute or one with "gaps" is a reasonable one.

While it may seem to the agency or the court below that EPA's consideration of the impact at other sites is a "reasonable" one as a *policy* matter, that is not the issue. The

---

2 *See also Middle South Energy, Inc. v. F.E.R.C.*, 747 F.2d 763 (D.C. Cir. 1984) where Judge Bork stated that "[p]rima facie, the use of the iterative adjective 'such' indicates that this language is understandable only by reference to the sole prior reference in" the particular statutory provision under review." *Id.* at 768. In that case, the court held that the regulatory agency lacked authority to veto or suspend initial rate filings by the company for the sale of electricity.

question is whether it is a "reasonable" interpretation *of the statute*, not whether it is "reasonable" as a general policy matter. The Clean Water Act is not a Wetlands Protection Act. Since the statute is clear, EPA's recourse is to Congress if it feels that it needs additional authority in administering the CWA. As the Supreme Court concluded in *Chevron*, "The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones: 'Our Constitution vests such responsibilities in the political branches.'" *Id.* at 866 *citing TVA v. Hill*, 437 U.S. 153, 195 (1978).

The leading case in the Second Circuit for this proposition is an opinion written by Circuit Judge Timbers in *Manchester Environmental Coalition v. Environmental Protection Agency*, 612 F.2d 56 (2d Cir. 1979). In a unanimous opinion, the court struck down the EPA's interpretation of a provision of the Clean Air Act, 42 U.S.C. 7410(a)(5)(A)(iii) in language that is equally applicable here:

> In short, none of the arguments advanced by the EPA is sufficient to overcome the clear import of the statutory language itself. As the Supreme Court stated in *TVA v. Hill*, 437 U.S. 153 (1978), *courts should not "ignore the ordinary meaning of [the] plain language" of the statute, even though effectuating that meaning may have undesirable public policy ramifications*. *Id.* at 173. In the instant case, for us to approve the EPA's construction of the proviso in question would be to preempt congressional action by judicially decreeing what "'accords with some modicum of common sense and the public weal.'" *Id.* at 194. We decline to do so.

Id. at 60 (Timbers, J.) (emphasis added). This admonition has, until the instant case, been consistently followed by the Second Circuit in its other decisions. *See, e.g., United States v. Perdue*

Farms, Inc., 680 F.2d 277, 285 (2d Cir. 1982) (literal reading of statute must be followed and "inequitable" results or "alleged drafting errors[s] are for Congress, not the courts, to resolve"); *State of Connecticut v. EPA*, 696 F.2d 147, 156 (2d Cir. 1982) (opinion by Timbers, J.) ("agency does not have carte blanche ... to interpret regulations or standards to achieve desired result;...proper course ... would be to amend" regulations); *McMahon v. Califano*, 605 F.2d 49, 52 (2d Cir. 1979) (opinion by Timbers, J.) (court will not look behind "plain meaning" of statute).

Other circuits have followed these fundamental principles of statutory construction as well. *See, e.g., Transbrasil S.A. Linhas v. Dep't of Transp.*, 791 F.2d 202, 206-07 (D.C. Cir. 1986) (striking down the FAA's limits on number of flights by carrier to abate noise, stating that when "statute's language and history indicate a clear congressional intent, the court may end its journey and deplane without ever reaching the issue of the extent of deference to be accorded the agency's interpretation") (opinion by Wald, J.); *Moore v. Harris*, 623 F.2d 908, 918 (4th Cir. 1980) (no ambiguity in statute; therefore, recourse to agency interpretation is improper).

Needless to say, this Court has not hesitated to overturn lower court decisions that depart from the basic rules of statutory construction. For example, in *Amoco Production Co. v. Village of Gambell, Alaska*, 107 S. Ct. 1396 (1987), this Court reversed a Ninth Circuit decision that enjoined the sale of oil leases on the Outer Continental Shelf (OCS) off Alaska. In so doing, this Court looked at the language of the statute restricting the sale of oil leases "in Alaska" and concluded that the OCS is not "in Alaska." It rejected the Ninth Circuit's opinion that the term "in Alaska" should be construed "in a general, 'nontechnical' sense to mean the geographic region of Alaska, including the Outer Continental Shelf." *Id.* at 1405. "We reject

the notion that Congress was merely waving its hand in the general direction of northwest North America when it defined the scope of [the statute] as 'Federal lands' 'situated in Alaska.'" *Id.* at 1405-06.

In the same manner, this Court should reject the EPA's determination that the term "such area" in section 404(c), which clearly means the site in question, *i.e.*, Sweedens Swamp, can be read to mean the geographic region of all of Massachusetts and/or the country at large.

Since it is undisputed that the EPA's consideration of the cumulative and historical loss of wetlands in places other than Sweedens Swamp was "important" to its finding that there would be "unacceptable adverse effects" on wildlife--which is the ultimate finding required by section 404(c)--and since that extraneous consideration was in *excess* of EPA's statutory authority and jurisdiction, this Court must reverse the lower court and order it to vacate the agency's decision. This result obtains even if this Court should reject Bersani's petition on the issue of whether there was a practicable alternative site on which to build the mall. This is so because the EPA expressly stated that *both* reasons, *i.e.*, the avoidability of the loss *and* the cumulative impact of losses of wetlands generally other than at the proposed site, together constituted the basis for vetoing the fill permit. Consequently, if any of the two reasons were improperly considered, the EPA could decide that the one reason standing alone would be insufficient grounds upon which to base its veto of the permit. Obviously, if both reasons were improperly considered, and we believe that they were (based upon the arguments in this petition as well as the petition of Bersani, *et al.*, and the dissenting opinion of Chief Judge Pratt), then the EPA would have no choice but to issue the permit.

CONCLUSION

The issue raised by this petition is a serious one dealing with the fundamental role of the federal courts in determining what the law is, not what it should be. Congress clearly limited the EPA's veto authority of a permit to considering the environmental effects of any fill at the proposed site in question. Never before has the EPA claimed such a broad expanse of authority as it has in this case. If this decision is not overturned, the EPA will be allowed by the courts rather than by Congress to exercise unlimited discretion in vetoing any of the 11,000 permit applications filed each year on the grounds that in its view, enough wetlands have already been filled in. In such a case, Congress' express desire to balance environmental consideration with responsible economic development in the permitting process will have been thwarted.

Respectfully submitted,

DANIEL J. POPEO
PAUL D. KAMENAR*

WASHINGTON LEGAL FOUNDATION
1705 N Street, N.W.
Washington, D.C. 20036
(202) 857-0240

*Counsel of Record

No. 88-929

Supreme Court, U.S.
FILED
DEC 21 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JOSEPH ROBICHAUD
and CITIZENS IN SUPPORT OF ATTLEBORO MALL,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Respondents.

RESPONSE OF RESPONDENTS JOHN A. BERSANI, NEWPORT GALLERIA GROUP, ROBERT J. CONGEL AND THE PYRAMID COMPANIES TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Gary H. Baise
Counsel of Record
Albert J. Beveridge, III
Virginia S. Albrecht
David M. Friedland
BEVERIDGE & DIAMOND, P.C.
1333 New Hampshire Ave., N.W.
Washington, D.C. 20036
(202) 828-0200

Attorneys for Respondents
John A. Bersani, Newport Galleria Group, Robert J. Congel and the Pyramid Companies

Dated: December 21, 1988.

CASILLAS PRESS, INC., 1717 K STREET, N.W., WASHINGTON, D.C. 20036

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-929

JOSEPH ROBICHAUD
and CITIZENS IN SUPPORT OF ATTLEBORO MALL,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Respondents.

RESPONSE OF RESPONDENTS JOHN A. BERSANI, NEWPORT GALLERIA GROUP, ROBERT J. CONGEL AND THE PYRAMID COMPANIES TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

On December 1, 1988, Joseph Robichaud and Citizens In Support of Attleboro Mall ("Robichaud"), Intervenor-Appellants below, filed a Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in *Bersani v. EPA*, 850 F.2d 36 (2d Cir. 1988). John A. Bersani, Newport Galleria Group, Robert J. Congel and the Pyramid Companies (collectively "Pyramid") also filed a Petition for Writ of Certiorari to review that decision on December 1, 1988. *Petition for a Writ of Certiorari*

to the United States Court of Appeals for the Second Circuit, No. 88-902. Pyramid supports the arguments made by Robichaud in Petition No. 88-929, and requests that if the Court grants both petitions 88-929 and 88-902, the cases be consolidated.

Respectfully submitted,

Gary H. Baise
Counsel of Record
Albert J. Beveridge, III
Virginia S. Albrecht
David M. Friedland
BEVERIDGE & DIAMOND, P.C.
1333 New Hampshire Avenue, N.W.
Washington, D.C.
(202) 828-0200

Attorneys for Respondents
John A. Bersani, Newport Galleria Group, Robert J. Congel and the Pyramid Companies

Date: December 21, 1988.

Supreme Court, U.S.
FILED
JAN 27 1989
JOSEPH F. SPANIOL, JR.
CLERK

(8) (4)

No. 88-902, No. 88-929

In The

Supreme Court Of The United States

October Term, 1988

JOHN A. BERSANI, *et al.*,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Repondents.

JOSEPH ROBICHAUD, *et al.*,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Respondents.

On Petitions For Writs of Certiorari
To the United States Court of Appeals
For The Second Circuit

BRIEF FOR RESPONDENTS CONSERVATION LAW FOUNDATION OF NEW ENGLAND, *ET AL.*, IN OPPOSITION

Robert G. Dreher
Sierra Club Legal Defense Fund
1531 P Street, N.W., Suite 200
Washington, D.C. 20005
(202) 667-4500
Counsel of Record
(Additional counsel listed on inside cover)

Balmar Legal Publishing Division, Washington, D.C. (202) 682-9800

James T.B. Tripp
Environmental Defense Fund
257 Park Avenue, South
New York, NY 10010
(212) 505-2100

Michael J. Bean
Environmental Defense Fund
1616 P Street, N.W.
Washington, D.C. 20036
(202) 387-3500

Hope Babcock
National Audubon Society
801 Pennsylvania Avenue, S.E.
Washington, DC 20003
(202) 547-9009

Janice L. Goldman-Carter
National Wildlife Federation
1400 16th Street, N.W.
Washington, D.C. 20036
(202) 797-6880

Peter Shelley
Conservation Law Foundation
of New England
3 Joy Street
Boston, MA 02108
(617) 742-2540

Attorneys for Respondents

LIST OF PARTIES

The list of respondents in the petitions by John A. Bersani *et al.* and Joseph Robichaud *et al.* omitted respondents Massachusetts Wildlife Federation and Massachusetts Association of Conservation Commissions, who intervened as defendants-appellees on behalf of respondents United States Environmental Protection Agency in the courts below.

TABLE OF CONTENTS

TABLE OF AUTHORITIES iv
STATEMENT OF THE CASE 1
A. Introduction 1
B. Statutory and Regulatory Framework 3
C. Factual and Procedural Background 4
ARGUMENT 6
1. The Decision of the Court of Appeals is Correct 6
2. Pyramid's Petition Does Not Raise an Important Issue of Federal Law 8
3. The Question Presented by Robichaud *et al.* Plainly Does Not Warrant This Court's Review 9
CONCLUSION 11

TABLE OF AUTHORITIES

CASES

Chevron, U.S.A., Inc. v. NRDC, 467 U.S. 837 (1984) 10

Commonwealth of Pennsylvania v. Union Gas Company, 832 F.2d 1343 (3d Cir. 1987), *cert. granted*, ___ U.S. ___, 108 S. Ct. 1219 (1988) 10

Tull v. United States, ___ U.S. ___, 107 S. Ct. 1831 (1987) 10

United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985) 10

STATUTES

Clean Water Act, § 101, 33 U.S.C. § 1251 3

Clean Water Act, § 404, 33 U.S.C. § 1344 . . . . . *passim*

REGULATIONS

33 C.F.R. § 323.6(a) 4

40 C.F.R. § 230.3(q-l), 230.41 4

40 C.F.R. § 230.10(a) 2,4,7 n.6

OTHER AUTHORITIES

45 Fed. Reg. 85,336, 85,338 (1980) 7 n.6

No. 88-902, No. 88-929

In The

Supreme Court Of The United States

October Term, 1988

JOHN A. BERSANI, *et al.*,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Repondents.

JOSEPH ROBICHAUD, *et al.*,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Respondents.

On Petitions For Writs of Certiorari
To the United States Court of Appeals
For The Second Circuit

BRIEF FOR RESPONDENTS CONSERVATION LAW FOUNDATION OF NEW ENGLAND, *ET AL.*, IN OPPOSITION

STATEMENT OF THE CASE

A. Introduction

This case involves challenges to the decision of the U.S. Environmental Protection Agency ("EPA") to prohibit the construction of a shopping mall by petitioners Bersani *et al.* ("Pyramid") in a Massachusetts wetland known as Sweedens

Swamp. Using the authority granted to it in § 404(c) of the Clean Water Act, 33 U.S.C. § 1344(c), EPA determined that filling Sweedens Swamp would have unacceptable adverse effects on wildlife, effectively vetoing a permit that the U.S. Army Corps of Engineers ("the Corps") proposed to issue to Pyramid for the mall. EPA's action was upheld by the United States District Court for the Northern District of New York, 674 F. Supp. 405 (N.D.N.Y. 1987), and affirmed on appeal by the United States Court of Appeals for the Second Circuit. 850 F.2d 36 (2d Cir. 1988).

EPA's action reflected the fundamental purpose of § 404 of the Clean Water Act: to protect wetlands from unnecessary destruction. The principal goal of the § 404 program is to keep development out of wetlands if it can occur on upland sites and still fulfill project purposes. *See* 40 C.F.R. § 230.10(a). EPA's decision to prohibit filling Sweedens Swamp was based upon its finding that Pyramid had ignored an available upland site where its project could have been built, averting serious adverse impacts upon wildlife dependent upon the swamp for habitat.

Pyramid now seeks to argue to this Court that it should not be held responsible for its decision to bypass the alternative site because, by the time it submitted its permit application, that site had fortuitously been acquired by another developer.[1] EPA determined, however, that its regulations required consideration of

---

[1] Ironically, after arguing strenuously to the Corps and EPA that the upland site in question was unsuitable for its project, Pyramid is itself now constructing a major shopping mall on that site as part of a joint venture with the other developer. Respondents Conservation Law Foundation of New England *et al.* learned of Pyramid's decision to build a mall on the alternate site through news reports while the parties' respective motions for summary judgment were pending before the district court. Affidavits subsequently filed by Pyramid in response to respondents' discovery requests averred that Pyramid still needed the § 404 permit at issue in this litigation, but did not say whether the mall described in its permit application would still be built at the Sweedens Swamp site. Since the joint venture agreement between Pyramid and the other developer was at that time still in draft form, respondents did not argue that the case was moot. Respondents are now seeking further information on the status of the joint venture and Pyramid's plans for Sweedens Swamp.

alternative sites available to Pyramid during its planning process, at the time of "market entry," when it could most readily avoid siting its project in a wetland. EPA's interpretation of its own regulations on this point was upheld by the district court and the court of appeals.

As the courts below found, EPA's protection of Sweedens Swamp was reasonable and consistent with EPA's regulations, its wetland protection policy, its statutory authority under § 404(c), and the overall objectives of the Clean Water Act. The aspect of EPA's decision for which *certiorari* is sought is, moreover, narrowly addressed to the unusual circumstances of this case, in which an available upland site ignored by the permit applicant during its project planning fortuitously became unavailable prior to submission of the formal permit application. For these reasons, respondents Conservation Law Foundation of New England *et al.*, thirteen nonprofit state and national conservation organizations,[2] submit that further review by this Court is not warranted.

B. Statutory and Regulatory Framework

The Clean Water Act, enacted in 1972, sets forth a bold objective of maintaining and restoring the chemical, physical, and biological integrity of the nation's waters. 33 U.S.C. § 1251(a). Responsibility for administering the Act lies with EPA except as otherwise expressly provided. 33 U.S.C. § 1251(d).

Section 404 of the Act, 33 U.S.C. § 1344, creates a permit program for any discharge of dredged or fill material into the waters of the United States, including wetlands. Congress divided the responsibilities for administering § 404 between EPA and the U.S. Army Corps of Engineers (the "Corps"). It placed the actual

---

[2] Respondents include the Conservation Law Foundation of New England, the Sierra Club, the Environmental Defense Fund, the National Wildlife Federation, the Massachusetts Wildlife Federation, the National Audubon Society, the Massachusetts Audubon Society, Citizens for Responsible Environmental Management, the Massachusetts Association of Conservation Commissions, the Massachusetts Society for Conservation Professionals, the Audubon Society of Rhode Island, the Rhode Island Association of Conservation Commissioners, and the Natural Resources Defense Council. None of these organizations has a corporate parent, subsidiaries, or any publicly held stock.

permitting authority with the Corps, but in considering permit applications the Corps must apply guidelines promulgated by EPA, in consultation with the Corps, pursuant to § 404(b). These "guidelines" are in fact regulations binding on the Corps and the public. *See* 33 U.S.C. § 1344(b)(1); 33 C.F.R. § 323.6(a).

A basic policy of the EPA guidelines is that wetlands not be needlessly destroyed. The guidelines forbid destruction of wetlands, which are "special aquatic sites," 40 C.F.R. §§ 230.3(q-1), 230.41, if there is a practicable alternative. § 230.10(a). Where the activity is not water-dependent, *i.e.*, where the activity "does not require access or proximity to or siting within the special aquatic site in question to fulfill its basic project purpose," such alternatives are presumed to exist unless the permit applicant clearly demonstrates otherwise. *Id.*

Although the Corps has the initial permitting authority for § 404, EPA exercises a "veto power" under § 404(c). Under this exclusive authority, EPA may deny or restrict the use of any area for disposal of dredged or fill material whenever it determines that such disposal "will have unacceptable adverse effect" on specified natural values, including wildlife. 33 U.S.C. § 1344(c). Section 404(c) empowers EPA to prohibit filling a wetland even after the Corps issues a permit authorizing disposal at that site.

C. Factual and Procedural Background

Sweedens Swamp is a New England red maple swamp, some 50 acres in size, located at the intersection of two major highways in Attleboro, Massachusetts. The swamp has been found to provide "excellent wildlife habitat" by EPA, the U.S. Fish and Wildlife Service, the Corps, and the state wildlife agency. JA 41, 140, 320.[3]

In 1984 Pyramid submitted an application to the Corps for a § 404 permit to fill large portions of the site for a proposed shopping mall. In its application and supplemental application, Pyramid insisted that marketing considerations rendered alternative sites in the area, particularly one nearby in North Attleboro,

---

[3] References to the Joint Appendix filed in the court below are as follows: "JA ___." References to the Appendix filed with Pyramid's Petition are as follows: "App. A___."

Massachusetts where another developer proposed to build a similar shopping mall, infeasible for its project. Pyramid stated that it would not accept the North Attleboro site even if it were offered "for free," with all necessary permits and approvals. JA 361. Because recent changes in that site's zoning had facilitated its use for a shopping mall, Pyramid also insisted -- in sharp contrast to the argument it now advances -- that the practicability of alternative sites be measured, not as of the time it submitted its application, but at an earlier time when it was making its siting decision. JA 374.

Finding that Pyramid had failed to demonstrate that alternative upland sites for its project were unavailable, the Corps' regional office recommended denial of the permit. JA 209. That recommendation was overruled by the Corps' Director of Civil Works, who embraced a novel theory, abandoned by Pyramid in this litigation, that Pyramid could eliminate the adverse effects of the project on Sweedens Swamp by constructing an artificial wetland elsewhere. JA 109. Under direction from Corps headquarters, the Corps' regional office proposed to issue the § 404 permit in June 1985.

In July 1985 EPA commenced veto proceedings pursuant to § 404(c). Following public hearings and opportunity for comment, EPA's Assistant Administrator for External Affairs issued a Final Determination in May 1986, prohibiting the project because it would have unacceptable adverse impacts on wildlife. App. C. Like the Corps' regional office, EPA found that Pyramid had failed to demonstrate that alternative sites were not available for its project. As EPA noted, "The uncontested fact is that Pyramid never checked the availability of the North Attleboro site during its investigation of the market, notwithstanding its knowledge that Sweedens Swamp suffered from significant environmental constraints." App. C 94a.[4] EPA rejected Pyramid's contention that the current unavailability of the North Attleboro

---

[4] The North Attleboro site had been purchased by another developer in 1983, during the approximate period when Pyramid was evaluating the market for a location for its own project. The record submitted by Pyramid was ambiguous, at best, concerning whether Pyramid had begun investigating the Attleboro real

site shielded it from responsibility for its decision to bypass an upland site during its planning process, ruling that the availability of alternatives to the applicant should under these circumstances be assessed as of the time it made its siting decision (as Pyramid had earlier advocated with respect to the practicability of such alternatives). *Id.* 92a-93a.

Because filling Sweedens Swamp would inflict serious damage upon wildlife values, and because that damage appeared avoidable, EPA concluded that the wildlife impacts of the project were unacceptable under § 404(c). *Id.* 106a-107a.[5]

Pyramid then commenced this action against the Corps and EPA, challenging EPA's action and seeking to compel issuance of a permit. In October 1987 the district court granted summary judgment to the government and to respondents, who had intervened as defendants. That judgment was affirmed on appeal by the Second Circuit in June 1988.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Nor does the decision of the court of appeals involve an important question of federal law which should be decided by this Court. Accordingly, review by this Court is unwarranted.

1. The Decision of the Court of Appeals is Correct

EPA's decision to prohibit the destruction of Sweedens Swamp, upheld by the court of appeals, was fully consistent with its regulations, its wetlands protection policy, statutory require-

---

estate market prior to the purchase of the North Attleboro site. Pyramid refused to provide further information to EPA concerning its market investigation. EPA accordingly concluded that Pyramid had not met its burden under 40 C.F.R. § 230.10(a)(3) of demonstrating that the alternative site had been unavailable. App. C 94a-97a.

[5] EPA also rejected the position of the Corps' Director of Civil Works that an applicant may freely substitute an artificial wetland for a natural one, finding substantial scientific uncertainty regarding the viability of artificial wetlands. App. C 100a-105a.

ments, and the broad objectives of the Clean Water Act. EPA acted to prevent the unnecessary destruction of a wetland for a non-water-dependent project, in conformance with the clear direction of the guidelines it promulgated under the authority of § 404(b)(1) of the Clean Water Act. Those guidelines establish presumptions, rebuttable only by clear evidence from the permit applicant, that alternative upland sites are available for a project such as Pyramid's shopping mall. On the complex administrative record developed during the Corps' permit review and EPA's subsequent § 404(c) proceeding, EPA concluded that Pyramid failed to demonstrate that an alternative site had not been available for its project.[6] Finding that the loss of Sweedens Swamp would entail serious adverse impacts on wildlife, and that those impacts appeared to have been avoidable, EPA quite properly concluded that the adverse impacts on wildlife were unacceptable under § 404(c), effectively vetoing the permit.

Pyramid seeks to argue to this Court that EPA and the court of appeals erred in looking to the period when it selected the site for its project, when an alternative site was available to it. Pyramid contends that the availability of alternatives should have been assessed only as of the later time when it filed its permit application, after the upland alternative site had fortuitously been purchased by another developer. As the court of appeals correctly found, however, EPA acted reasonably in looking to the time period when actual siting decisions were made by the applicant, since that is the time when the applicant can most readily avoid needless location of its project in a wetland. Interpretation of EPA's guidelines to extend to the site-decision period thus directly

---

[6] Contrary to Pyramid's contention, EPA's finding on this point did not violate its burden of proof under § 404(c). EPA's responsibility in invoking its authority under § 404(c) is to justify its action. *See* 45 Fed. Reg. 85,336, 85,338 (1980). That responsibility does not alter the substantive burden placed by the guidelines on a permit applicant to "clearly demonstrate" that practicable alternatives are unavailable. 40 C.F.R. § 230.10(a)(3). Failure by an applicant to sustain that burden in its application plainly provides an appropriate basis for EPA to veto a proposed permit. EPA's Final Determination clearly states the basis for its action in this case, and fully satisfies its burden.

furthers the guidelines' underlying policy, which is to steer private development away from wetlands wherever possible. Pyramid itself had earlier argued strenuously to the Corps that the practicability of alternatives should be assessed as of the time of its site decision, rather than as of the later time of permit application, on the grounds that to do otherwise would be fundamentally unfair to the developer. JA 374. Thus, the decision of the court of appeals was correct, and, as it does not conflict with the decision of any other court of appeals, does not warrant this court's review.

2. Pyramid's Petition Does Not Raise an Important Issue of Federal Law

Even apart from the correctness of the decision below, the Court should note that the decision involves a very narrow issue, applicable only in the highly unusual circumstances of this case. EPA expressly limited its decision to the circumstance where a developer enters the market area for the accomplishment of a specific project; it did not address, and the court of appeals decision should not be read as extending to, the relevant time period for analysis of alternatives under other circumstances, as where an applicant wishes to build upon property acquired or inherited long before. App. C 93a. Even with respect to applications from developers entering a new market, analysis of alternatives at the time of market entry will affect applicants only under the most unusual of circumstances: only where an available upland alternative ignored by a developer becomes unavailable fortuitously prior to actual submission of the permit application, and only where there are no *other* alternative sites for the project at the time of application.[7]

Contrary to the ominous claims of Pyramid and *amici*, therefore, the court of appeals' decision will have little effect on the normal processing of § 404 applications. Few applications, if any,

---

[7] Respondents note that the administrative record in this case indicates that several other alternative sites exist for Pyramid's project, apart from the North Attleboro site whose availability is at issue in this litigation. JA 161, 168-71. The availability of other alternative sites would support a decision by EPA to prohibit this project even if this Court were to reverse the court of appeals regarding the availability of the North Attleboro site.

will duplicate the factual circumstances of this case. Nor will the court of appeals' decision create "chaos" within the development community, as broadly asserted by Pyramid and *amici*. That needless destruction of wetlands should be avoided wherever possible is already well-established in the § 404 program, and should surprise no one. The application of that principle in this case is readily comprehensible: when a developer enters a market to build a project, it must consider upland locations for its project during the planning leading up to its selection of a site, and should locate the project in a wetland only if no upland sites are available.

Pyramid also errs in claiming that EPA's decision was inconsistent with prior administrative practice. Precisely because the question raised in this case will occur only under highly unusual factual circumstances, neither EPA nor the Corps have ever had occasion before this case to address the proper time period in which to assess the availability of alternatives to an applicant. To the extent they involved the question of availability of alternatives, the judicial decisions and prior § 404(c) veto proceedings cited by Pyramid all involved circumstances where alternative upland sites were plainly available at the time of application. Pyramid's repeated contention that the Corps and EPA had previously looked to the period of permit application is thus meaningless, for neither agency had previously confronted the timing issue.

Pyramid is equally in error in suggesting, without the slightest support, that the Corps of Engineers disagrees with EPA over this issue. While EPA quite plainly disagreed with the Corps over its decision to grant a permit to Pyramid, that disagreement was over entirely different issues than those raised by the petitioners in this action. Both EPA and the Corps are parties to this action, and have joined in defending EPA's decision on this point. The Justice Department attorney representing the government on appeal stated unequivocally to the court of appeals that he represented the Corps and that the Corps joined fully in the briefs submitted to that court.

The principle that Pyramid would have this Court review is thus a narrow one, addressed to specific and unusual factual circumstances, and developed by EPA quite properly through the

adjudication of the particular case where these circumstances were found to exist. The question Pyramid raises thus falls far short of the significance of the questions presented in cases, such as those cited by Pyramid itself, where this Court has granted review to decide issues central to entire regulatory programs. *See, e.g., Commonwealth of Pennsylvania v. Union Gas Company*, 832 F.2d 1343 (3d Cir. 1987), *cert. granted*,___U.S.___, 108 S. Ct. 1219 (1988) (*certiorari* granted to determine whether private parties may sue states in federal court to recover cleanup costs under the Superfund law); *Tull v. United States*, ___U.S.___, 107 S. Ct. 1831, 1835 (1987) (*certiorari* granted to resolve conflict among courts of appeals regarding whether a jury trial is required to establish liability and assess penalties for violation of § 404 of the Clean Water Act); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126 (1985) (*certiorari* granted to determine validity of Corps' regulations defining "adjacent wetlands" as "waters of the United States" under the Clean Water Act); *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984) (*certiorari* granted to review validity of EPA's "bubble concept" under the Clean Air Act). Accordingly, Pyramid's petition does not raise an issue of federal law of sufficient import to warrant review by this Court.

3. The Question Presented by Robichaud *et al.* Plainly Does Not Warrant This Court's Review

The argument presented by petitioners Robichaud *et al.* is of even less consequence than that raised by Pyramid, and was properly rejected by the court of appeals. Robichaud *et al.* contend that EPA erred in taking into consideration the widespread destruction of wetland habitat throughout Massachusetts and the northeastern United States in finding the impacts of Pyramid's proposed mall on wildlife unacceptable. Robichaud *et al.*'s argument is plainly erroneous, and unworthy of this Court's attention. Nothing in the language of § 404(c) so illogically restrains EPA. Indeed, it is difficult to envision how EPA could possibly evaluate the ecological significance of wildlife impacts in order to determine if those impacts are "unacceptable" without considering the context in which those losses take place. To take obvious examples, how could EPA assess the significance of destruction of

specific habitat for a species without considering whether that species is endangered, or otherwise under stress within its range? Similarly, how could EPA assess the relative value of the habitat provided by a particular parcel of wetlands without considering the surrounding area? Fifty acres of swamp might not be significant in the context of Florida's Everglades, but in the increasingly urbanized Northeast it may represent a precious oasis of wildlife habitat, as EPA found here.

The contention of Robichaud *et al.* that EPA must blind itself to every consideration of ecological context in invoking its powers under § 404(c) is thus wholly without merit, and does not deserve this Court's attention.

CONCLUSION

For the reasons stated, the petitions for writs of certiorari should be denied.

Respectfully submitted,

Robert G. Dreher
Sierra Club Legal Defense Fund

Counsel of Record for Respondents

James T.B. Tripp
Michael J. Bean
Environmental Defense Fund

Hope Babcock
National Audubon Society

Janice L. Goldman-Carter
National Wildlife Federation

Peter Shelley
Conservation Law Foundation
of New England

Attorneys for Respondents

January 1989

(10) (5)

No. 88-902 and 88-929

Supreme Court, U.S.
FILED
FEB 27 1989
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1988

JOHN A. BERSANI, ET AL., PETITIONERS

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.

JOSEPH ROBICHAUD AND CITIZENS IN SUPPORT OF ATTLEBORO MALL, PETITIONERS

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

WILLIAM C. BRYSON
Acting Solicitor General
DONALD A. CARR
Acting Assistant Attorney General
PETER R. STEENLAND, JR.
MARGARET N. STRAND
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

GERALD H. YAMADA
Acting General Counsel
ANNE H. WILLIAMS-DAWE
CATHERINE A. WINER
Attorneys
Environmental Protection Agency
Washington, D.C. 20460

18 pp

QUESTION PRESENTED

Whether the Administrator of the Environmental Protection Agency abused his discretion in determining, under Section 404(c) of the Clean Water Act, 33 U.S.C. 1344(c), that the development of a shopping mall in a 49.5-acre wetland in Attleboro, Massachusetts, would have an unacceptable adverse effect on wildlife.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statement	2
Argument	10
Conclusion	15

TABLE OF AUTHORITIES

Case:

United States v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985) 2

Statutes and regulations:

Administrative Procedure Act, 5 U.S.C. 701 *et seq.*:
- 5 U.S.C. 704 8
- 5 U.S.C. 706 8

Clean Water Act, 33 U.S.C. 1251 *et seq.*:
- § 101, 33 U.S.C. 1251 ..... 2, 11
- § 301, 33 U.S.C. 1311 2
- § 404, 33 U.S.C. 1344 ..... 2, 4, 11
- § 404(b), 33 U.S.C. 1344(b) (1982 & Supp. IV 1986) 2, 6, 12
- § 404(c), 33 U.S.C. 1344(c) 3, 5, 12, 13, 14
- § 502, 33 U.S.C. 1362 2

40 C.F.R.:
- Pt. 230:
  - Section 230.10(a) 2, 8
  - Section 230.10(a)(2) 2, 9
  - Section 230.10(a)(3) 3
- Pt. 231 3
  - Section 231.2(e) 3, 12

In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-902

JOHN A. BERSANI, ET AL., PETITIONERS

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.

No. 88-929

JOSEPH ROBICHAUD AND CITIZENS IN SUPPORT OF ATTLEBORO MALL, PETITIONERS

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (88-902 Pet. App. 1a-29a) is reported at 850 F.2d 36.[1] The opinion of the district court (Pet. App. 32a-63a) is reported at 674 F. Supp. 405. The Final Determination of the Assistant Administrator (Pet. App. 64a-108a) is unreported.

---

[1] Unless otherwise indicated, "Pet. App." refers to the appendix to the petition in No. 88-902.

JURISDICTION

The judgment of the court of appeals (Pet. App. 30a) was entered on June 8, 1988. A petition for rehearing was denied on September 2, 1988 (Pet. App. 109a-110a). The petitions for a writ of certiorari were filed on December 1, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Clean Water Act, 33 U.S.C. 1251 *et seq.*, was enacted in order to "restore and maintain the chemical, physical, and biological integrity of the Nation's Waters" (Sec. 101, 33 U.S.C. 1251). Under Sections 301 and 502 of the Act, 33 U.S.C. 1311 and 1362, any discharge of dredged or fill materials into "navigable waters"—defined to include "waters of the United States"—is forbidden unless authorized by a permit issued by the Secretary of the Army, acting through the Corps of Engineers, pursuant to Section 404, 33 U.S.C. 1344 (1982 & Supp. IV 1986). See *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 123 (1985).

In deciding whether to issue a permit under Section 404, the Corps is governed by guidelines developed jointly by the Secretary and by the Administrator of the Environmental Protection Agency (EPA). 33 U.S.C. 1344(b) (1982 & Supp. IV 1986). Those guidelines provide that "no discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem" (40 C.F.R. 230.10(a)). The guidelines further specify that an alternative is "practicable" if "it is available and capable of being done, after taking into consideration cost, existing technology, and logistics in light of overall project purposes" (40 C.F.R. 230.10(a)(2)). Moreover, an

otherwise available alternative may be considered even if it is "not presently owned by the applicant," provided that such alternative can "reasonably be obtained, utilized, expanded or managed in order to fulfill the basic purpose of the proposed activity" (*ibid.*).

The guidelines also state two presumptions that govern the Corps' evaluation of practicable alternatives. First, where a proposed project will affect a "special aquatic site" (which is defined to include wetlands (see Pet. App. 36a)), but the project does not by its nature require access to such an aquatic site, the guidelines state that "practicable alternatives that do not involve special aquatic sites are presumed to be available, unless clearly demonstrated otherwise" (40 C.F.R. 230.10(a)(3)). Second, where the project will affect a special aquatic site, "all practicable alternatives to the proposed discharge which do not involve a discharge into a special aquatic site are presumed to have less adverse impact on the aquatic ecosystem, unless clearly demonstrated otherwise" (*ibid.*).

Section 404(c), 33 U.S.C. 1344(c), authorizes the Administrator of the EPA to veto a permit that otherwise would be issued by the Corps, where the Administrator determines that the proposed discharge "will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas." An "unacceptable adverse effect" is one that has an "impact on an aquatic or wetland ecosystem which is likely to result in significant degradation of municipal water supplies (including surface or ground water) or significant loss of or damage to fisheries, shellfishing, or wildlife habitat or recreation areas" (40 C.F.R. 231.2(e)). The Administrator must exercise that "veto" power in accordance with established procedures. See 40 C.F.R. Pt. 231.

2. a. The present case concerns petitioner Pyramid Companies' proposed construction of a shopping mall in certain wetlands, known as "Sweedens Swamp," located in Attleboro, Massachusetts. Sweedens Swamp is a 49.5-acre wetland, which is part of an 80-acre site near Interstate 95. It is undisputed that Pyramid's proposed shopping center would involve the discharge of dredged or fill materials into "waters of the United States," thereby requiring a permit under Section 404 of the Clean Water Act. Pet. App. 3a, 6a, 9a.

Some time prior to April 1982, Pyramid's predecessor, the Edward J. DeBartolo Corporation, purchased the swamp. At that time, there was a second, non-wetland site available, only three miles away in North Attleboro, Massachusetts, that could also have accommodated the proposed shopping mall. On July 1, 1983, however, the New England Development Company, a competitor of Pyramid, began to purchase options to buy the North Attleboro site. Thereafter, in December 1983, Pyramid purchased Sweedens Swamp from DeBartolo. Pet. App. 9a-11a, 40a.

In August 1984, Pyramid applied to the New England regional division of the Corps for a permit to discharge into Sweedens Swamp.[2] It sought to fill or alter 32 of the 49.5 acres of the swamp; to excavate nine acres of uplands in an attempt to create artificial wetlands; and to alter 13.3

---

[2] Because Massachusetts requires state approval for projects that would fill wetlands, DeBartolo had previously applied to the Massachusetts Department of Environmental Quality Engineering (DEQE) for permission to build on Sweedens Swamp. DEQE initially denied the application. Thereafter, in March 1985, DEQE granted approval to Pyramid for the project, based on an application of regulations that were in effect when DeBartolo had applied. That determination was eventually upheld by the Massachusetts Supreme Judicial Court. Pet. App. 9a-10a.

acres of existing wetlands to improve its environmental quality. Some time later, Pyramid proposed to mitigate the adverse impact on the wetlands by attempting to create 36 acres of replacement wetlands in an off-site gravel pit. Pet. App. 11a.

In connection with its application for a permit, Pyramid submitted information concerning "practicable alternatives" to the Sweedens Swamp site, including the North Attleboro site. In rejecting the latter site as an alternative, Pyramid contended that it " 'lacked sufficient traffic volume and sufficient access from local roads' "; that " 'potential department store tenants had expressed strong doubts about the feasibility of the site' "; and that " 'previous attempts to develop the site had met with strong resistance from the surrounding community.' " Pet. App. 11a-12a (emphasis omitted).

On May 2, 1985, after receiving comments from EPA that were critical of the proposed construction, the Corps' regional division recommended to national headquarters that the permit to construct the mall be denied. General John F. Wall, the Director of Civil Works at the national headquarters, disagreed. He found that Pyramid's proposal to create an off-site artificial wetland sufficiently mitigated the adverse environmental effects of the project. He also determined that the North Attleboro site was unavailable as an alternative because it had been "optioned by another developer." On June 28, 1985, pursuant to Wall's directive, the Corps sent Pyramid a notice of its intent to grant the permit. Pet. App. 12a-13a.

b. EPA thereafter initiated a review of the Corps' decision under Section 404(c). On May 13, 1986, the agency determined that a permit should not be issued (Pet. App. 64a-108a). The agency first found that Sweedens Swamp "provides many wetland values such as wildlife habitat,

food chain production, natural flood storage, groundwater discharge, and water quality renovation" (*id.* at 76a). "Construction of a large shopping center at Sweedens Swamp," the agency explained, "would drastically change the hydrology, soils, and biology of the area" (*ibid.*). In particular, the agency found that the proposed project would eliminate or alter a substantial part of the wildlife habitat in the swamp, including "species of birds, small mammals, and amphibians, that are typical of New England forested swamps" (*id.* at 77a). The agency therefore concluded that the mall project "would have adverse impacts on wildlife values protected by section 404(c)" of the Clean Water Act (*id.* at 83a).

The agency next addressed the question whether the adverse effects of the mall project were "unacceptable," explaining that that question turned, in part, on whether there were less drastic alternatives available. The agency found that the North Attleboro site was a "practicable alternative" to Sweedens Swamp (Pet. App. 86a-105a). It determined that the North Attleboro site was feasible, noting that New England Development was pursuing a similar project on that site (*id.* at 88a). The agency also concluded that the North Attleboro site was "available." In reaching that conclusion, EPA examined the period during which the company was investigating the trade area and before it selected Sweedens Swamp (when it "entered the market" (Pet. App. 95a)), as well as the period between Pyramid's purchase of Sweedens Swamp in December 1983 and the submission of its permit application in July 1984. The agency observed that the guidelines under Section 404(b) "were intended to avoid unnecessary filling of wetlands and to require a prospective discharger to take a hard look *before* concluding that upland sites are not available" (*id.* at 92a (emphasis in the original)). Ac-

cordingly, the agency reasoned, "[i]t is both fair and consistent with the Guidelines to review the period of availability as including the period when the developer is selecting a site for its project" (*id.* at 93a). EPA found that the record clearly showed that "Pyramid and New England Development were exploring the same trade area at approximately the same time and that Pyramid decided against the North Attleboro site solely on the basis of unsuitability" (*id.* at 95a). The agency also explained that "[t]he uncontested fact is that Pyramid never checked the availability of the North Attleboro site during its investigation of the market, notwithstanding its knowledge that Sweedens Swamp suffered from significant environmental constraints. Pyramid rejected the site not because it was unavailable but because Pyramid believed it was not an economically viable site." *Id.* at 94a. The agency concluded that Pyramid had not "met its burden of showing that the North Attleboro site was unavailable" (*id.* at 95a-96a).[3]

Finally, the agency concluded that "locating a shopping mall at the North Attleboro site would have less adverse impact on the aquatic ecosystem" (Pet. App. 98a). Among other things, the agency noted, "the North Attleboro site has less than one acre total wetlands, scattered in small pieces, compared to the 32 acres to be filled at Sweedens Swamp" (*ibid.*). The agency also rejected as insufficient Pyramid's proposal to mitigate the adverse impact of its project by creating a wetland complex out of a mostly

---

[3] EPA also noted that since New England Development had not acquired all its options on the North Attleboro site until July 1984, the site may have remained available to Pyramid throughout that period. In addition, the agency found that because of "[t]he special circumstances of this case," any alternative that had been available to Pyramid's predecessor should likewise be regarded as an alternative available to Pyramid. Pet. App. 95a-97a.

upland gravel pit. It found that the proposal "presents substantial risks and uncertainties" (*id.* at 101a), and that "even if successful," the proposal "would not provide the same kind of habitat as that which would be lost at Sweedens Swamp" (*id.* at 103a-104a).

3. Petitioners thereafter brought an action in the United States District Court for the Northern District of New York, challenging EPA's decision as arbitrary and capricious under the Administrative Procedure Act, 5 U.S.C. 704, 706. On cross-motions for summary judgment, the district court ruled for respondents (Pet. App. 32a-63a). The court first found (*id.* at 47a-55a) that in deciding whether the proposed use of the wetlands would have an "unacceptable adverse effect," the agency was entitled "to take into account the existence of a 'practicable alternative' " (*id.* at 48a). Turning to the merits, the court upheld EPA's finding that the North Attleboro site constituted a practicable alternative to Sweedens Swamp. The court agreed that the North Attleboro site was both feasible (*id.* at 55a-57a) and available to Pyramid (*id.* at 57a-59a), and it rejected petitioners' contention that a site may be found to be "available" under 40 C.F.R. 230.10(a) only if it is available to the developer at the time that the agency acts on the developer's permit application. The court found, instead "that the record supports the EPA's finding that the North Attleboro site was available to Pyramid at the time it 'entered the market' in September or December of 1983" (*id.* at 60a).[4]

---

[4] The district court also held that "[e]ven assuming that the EPA reached an arbitrary decision regarding the availability of a practicable alternative, its Final Determination must be upheld as reasonable because it was based upon a rational, independent finding that a significant loss in wildlife would result from the construction of a mall at Sweden's [*sic*] Swamp" (Pet. App. 61a).

4. The court of appeals affirmed by a divided vote (Pet. App. 1a-29a). The court first held that EPA's construction of the governing regulations—according to which the availability of the North Attleboro alternative should be judged as of the time that Pyramid entered the market for a construction site—was reasonable in these specific circumstances. The court explained that although the language of 40 C.F.R. 230.10(a)(2) is phrased in the present tense, " 'the regulations do not indicate *when* it is to be determined whether an alternative "is" available,' i.e., the 'present' of the regulations might be the time the application is submitted; the time it is reviewed; or any number of other times" (Pet. App. 16a (emphasis in the original)). Moreover, the court noted that the purpose of the regulations "is to create an incentive for developers to avoid choosing wetlands when they could choose an alternative upland site" (*ibid.*); petitioners' reading of the regulations, the court stated, "would thwart this purpose because it would remove the incentive for a developer to search for an alternative site at the time such an incentive is needed, i.e., at the time it is making the decision to select a particular site" (*id.* at 16a-17a). "If the practicable alternatives analysis were applied to the time of the application for a permit," the court explained (*id.* at 17a), "the developer would have little incentive to search for alternatives, especially if it were confident that alternatives soon would disappear."[5]

Judge Pratt dissented (Pet. App. 25a-29a). In his view, the market entry analysis improperly "focus[es] on the decisionmaking techniques and tactics of a particular developer" (*id.* at 26a) and "inject[s] exquisite vagueness"

---

[5] The court also held that EPA's "market entry" approach to the regulations was not in conflict with prior practice (Pet. App. 17a-19a), and that it was neither excessively vague nor unfair (*id.* at 22a-24a).

into the determination of whether a particular site is an "available" alternative (*id.* at 27a). Judge Pratt concluded that the availability of a site should instead be based on "the circumstances which exist at the time [EPA] makes its decision" (*id.* at 28a).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Moreover, petitioners' challenge to the EPA's decision arises principally from the unusual facts of this case: that by the time Pyramid submitted its application for a permit, a competitor had begun purchasing options to an otherwise available upland site, thereby making it arguably unavailable to Pyramid. The agency's fact-bound determination, upheld by both the district court and the court of appeals, warrants no further review.

1. Petitioners first contend (88-902 Pet. 13-18) that the "market entry" formulation "provid[es] no guidance to the regulated community of the standard to which it will be held" (*id.* at 13), because EPA has "refused to specify the point in time at which the availability inquiry begins" (*id.* at 14). Petitioners assert that governmental planning agencies, in particular, "are always in the market" (*id.* at 15). In petitioners' view, the EPA's standard is imprecise and they contend that as a result "[l]ocal, state and regional planning efforts will be undermined" (*id.* at 17).

The question when, precisely, a developer is "in the market" for purposes of the "market entry" standard is simply not presented in this case. As the agency found—in a finding that petitioners do not dispute—"[t]he uncontested fact is that Pyramid never checked the availability of the North Attleboro site during its investigation of

the market, notwithstanding its knowledge that Sweedens Swamp suffered from significant environmental constraints" (Pet. App. 94a). Indeed, the agency noted (*ibid.* (citation omitted)), "Pyramid rejected the site not because it was unavailable but because Pyramid believed it was not an economically viable site. Pyramid stated that it would have turned down the site for its project even if it were offered 'for free.' " In short, Pyramid never considered the North Attleboro site at all, regardless of when Pyramid was in the market or the site was available. The EPA accordingly had no occasion in this case to resolve the precise moment at which a developer may be said to be "in the market," for purposes of determining the availability of competing alternatives.

2. Petitioners next contend (88-902 Pet. 18-25) that EPA's market entry standard is inconsistent with the purpose of Section 404 of the Clean Water Act, because it does not require "an objective inquiry into the impacts on the physical environment that would result from the choice of one site over another" (*id.* at 20). In petitioners' view, EPA's analysis "disregards the environmental impacts on the land in question" and thereby "fail[s] to protect the wetland" (*ibid.*).

As the court of appeals explained, however, EPA's application of the regulations in this case is entirely faithful to the purposes of the Clean Water Act. The Act is designed, in principal part, to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters" (33 U.S.C. 1251). By focusing on the period during which a developer is considering its options, and has not yet committed its resources to a particular wetland site, the market entry standard "create[s] an incentive for developers to avoid choosing wetlands when they could choose an alternative upland site" (Pet. App. 16a). By con-

trast, "[i]f the practicable alternatives analysis were applied to the time of the application for a permit, the developer would have little incentive to search for alternatives, especially if it were confident that alternatives would soon disappear" (*id.* at 17a).

Petitioners assert (88-902 Pet. 20), however, that the market entry approach "leads inevitably to consideration of factors far different from those contemplated by Congress." For example, in this case, petitioners argue, the agency inappropriately requested records reflecting the developer's efforts to pursue upland alternatives. Petitioners apparently believe (see *id.* at 21, 23-24) that the EPA may evaluate only the environmental impact of a project, and may not consider whether there are alternatives available to the developer. There is no basis for that contention. Section 404(c) of the Act, 33 U.S.C. 1344(c), expressly requires the agency to determine whether the proposed project "will have an unacceptable adverse effect." As the district court observed (Pet. App. 48a), Section 404(c) does not preclude the EPA, in determining whether an "adverse effect" is "unacceptable," from considering whether less "adverse" alternatives were available. Indeed, the regulations promulgated under Section 404(c) state that the Administrator should consider the "relevant portion of the [404(b)] guidelines" in making his Section 404(c) unacceptability determination; the Section 404(b) guidelines expressly require a consideration of practicable alternatives. See 40 C.F.R. 231.2(e); Pet. App. 6a-7a & n.2, 48a.

3. Petitioners also contend, in passing (88-902 Pet. 25-27), that evaluating alternatives at the time of market entry is inconsistent with the language of the pertinent regulations. The court of appeals correctly rejected that claim. Although the regulations are phrased "in the pres-

ent tense" (88-902 Pet. 25), they do not specify the point in time at which an alternative must be "available" in order to constitute a "practicable alternative." The court of appeals was therefore correct in concluding that "when the agencies drafted the language in question they simply were not thinking of the specific issues raised by the instant case, in which an applicant had available alternatives at the time it was selecting its site but these alternatives had evaporated by the time it applied for a permit" (Pet. App. 16a). Because the text does not resolve the issue, the court correctly looked to the *purpose* of the regulations—"to create an incentive for developers to avoid choosing wetlands when they could choose an alternative upland site" (*ibid.*)—and held that EPA's interpretation of the regulations comports with that governing purpose.

4. In the court of appeals, petitioners also contended that the analysis of alternatives at the time of market entry is inconsistent with the past regulatory practices of both the Corps and the EPA (Pet. App. 17a-19a). The Second Circuit rejected that contention, finding that the issue was one of first impression (*id.* at 19a). Petitioners do not renew that claim, apparently recognizing that there is no conflict among the lower courts over the market entry analysis. They assert, however, that the issue is sufficiently important to warrant this Court's review. But, as the Second Circuit observed, EPA had employed its Section 404(c) authority only five times since the enactment of that provision. During that same time, the Corps has processed an average of 11,000 permit applications annually. Pet. App. 9a.

Moreover, petitioners' present challenge to the market entry approach contradicts the position they took at an earlier stage in these proceedings. When petitioners submitted their supplemental permit application to the Corps in October 1984, they argued that the appropriate time for

assessing practicable alternatives was when the applicant was exercising its business judgment. Pet. App. 93a. As petitioners put it at the time, "To avoid this 'second guessing' of reasonable business judgments, the regulating agency's reference point must be the point in time when the proponent analyzed its alternatives." C.A. App. 372. That is the very time frame that the EPA analyzed, and that petitioners now repudiate.

5. Finally, petitioners contend (88-929 Pet. 6-12) that the EPA exceeded its statutory jurisdiction under Section 404(c) when, in making its decision, it considered the environmental consequences of the proposed shopping mall for other parts of Massachusetts, in addition to the impact on Sweedens Swamp. That claim is meritless. Section 404(c) authorizes the Administrator of EPA to prohibit a proposed discharge when he finds that it "will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas" (33 U.S.C. 1344(c)). By its terms, Section 404(c) does not limit the regions that the Administrator may take into account in making his determination, and it certainly does not require him to consider only the effect on the particular wetland site. Indeed, because a significant change in the environmental quality of a particular wetland is likely to affect the quality of surrounding regions (see Pet. App. 77a, 79a), it would not be sensible to construe Section 404(c) as narrowly as petitioners propose.[6]

---

[6] Petitioners base their contrary reading of Section 404(c) on the fact that the provision authorizes the Administrator to prohibit discharge into a "defined area' whenever he determines that the requested discharge into "such area" will have an unacceptable adverse effect (88-929 Pet. 7-8). The quoted language provides simply that the Administrator must determine whether to permit discharge into a

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

WILLIAM C. BRYSON
Acting Solicitor General
DONALD A. CARR
Acting Assistant Attorney General
PETER R. STEENLAND, JR.
MARGARET N. STRAND
Attorneys

GERALD H. YAMADA
Acting General Counsel
ANNE H. WILLIAMS-DAWE
CATHERINE A. WINER
Attorneys
Environmental Protection Agency

FEBRUARY 1989

---

specific area; it does not provide that, in making that determination, he is forbidden to consider the environmental impact on surrounding areas.

☆ U.S. GOVERNMENT PRINTING OFFICE: 1989—241-699/00127

Supreme Court, U.S.
FILED
MAR 2 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-929

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

JOSEPH ROBICHAUD AND CITIZENS
IN SUPPORT OF ATTLEBORO MALL,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, *ET AL.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY OF PETITIONERS JOSEPH ROBICHAUD AND CITIZENS IN SUPPORT OF ATTLEBORO MALL

Daniel J. Popeo
Paul D. Kamenar*

WASHINGTON LEGAL FOUNDATION
1705 N Street, N.W.
Washington, D.C. 20036
(202) 857-0240

*Counsel of Record

Date: March 2, 1989

CASILLAS PRESS, INC. – 1717 K ST NW WASHINGTON DC 20036 – 223-1220

No. 88-929

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

JOSEPH ROBICHAUD AND CITIZENS IN SUPPORT OF ATTLEBORO MALL, PETITIONERS,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY OF PETITIONERS JOSEPH ROBICHAUD AND CITIZENS IN SUPPORT OF ATTLEBORO MALL

Petitioners Joseph Robichaud and Citizens in Support of Attleboro Mall principally argued in their petition that the Environmental Protection Agency (EPA) exceeded its statutory authority under Section 404(c) of the Clean Water Act (33 U.S.C. 1344(c)) by taking into account the loss of other wetlands regionally and nationally in deciding to veto a fill permit for part of Sweedens Swamp (an admittedly *isolated* swamp unconnected to those other wetlands), rather than focusing on the environmental impacts at the site in question. Pet. 6-12. The EPA responds that Section 404(c) "does not limit the regions that the Administrator may take into account in making his determination, and it certainly does not require him to consider only the effect on the particular wetland site." Opp. at 14. The EPA elaborates by stating that a change in the quality of a particular wetland

"is likely *to affect* the quality of surrounding regions" and that it would not be "sensible" to construe Section 404(c) narrowly. *Id.* (emphasis added). The EPA notes that Section 404(c) does not forbid the EPA from considering the environmental impact of the proposed fill "on surrounding areas." *Id.* at 15, n.6.

It is not surprising that EPA is unable to cite to any authority for the novel proposition that a government agency can consider any factor it pleases, sensible or otherwise, in its decisionmaking process, so long as Congress did not expressly forbid the agency from considering such factors. If that were the law, Congress would henceforth have to draft already prolix statutes in such a way as to include an exhaustive list of what an agency cannot do in addition to what the agency is authorized to do under the law. But even if the EPA is correct, the consideration of the historical loss of other wetlands by the EPA in this case as an "important" reason for vetoing the permit to fill a portion of Sweedens Swamp does not even meet the EPA's own test as formulated in its Opposition. For in the proceedings below, EPA demonstrated no connection whatsoever between whatever wildlife habitat may be lost at Sweedens Swamp and the loss of wetlands regionally or nationally.

But even assuming that the EPA can consider the environmental impact of the fill on the "surrounding regions" or "surrounding areas", Opp. at 14 and n.6, the EPA Administrator did much more than look at the impact that the filling of Sweedens Swamp may have *in futuro* on the "surrounding" or adjacent areas. As the EPA makes clear in its final determination and as recounted in our brief, the EPA considered the *historical* loss of wetlands generally in the region and nationally, losses which have absolutely nothing to do with the filling in of Sweedens Swamp in the future. Pet. at 6. By all common sense and logic, the losses of wetlands in the past could not have been

caused by a proposal to fill Sweedens Swamp in the future. Nor does the EPA make any pretense of an argument that the filling of Sweedens Swamp in the future would even cause any adverse effect in the future on any other wetland. In short, the EPA seriously misleads this Court by suggesting that the EPA simply considered the impact of the proposed fill at Sweedens Swamp on "surrounding" areas. What the EPA is really attempting to do here is to claim an unprecedented and sweeping power to veto any fill permit when in its view, enough wetlands statewide, regionally, or nationwide, have *already* been filled in. While a policy of "no net wetland loss" may be desirable by some, such controversial policies are to be decided by the proper branch of government, namely, the Congress.

The question presented is not merely one of whether the agency abused its discretion; rather, the question is whether the agency had any authority at all to consider a factor it deemed "important" in making its decision, but one which Congress did not intend for the agency to consider. Accordingly, the issue raised by petitioners demands review by this Court to ensure that neither the agency nor the courts usurp the policy and lawmaking powers properly belonging to the Congress.

Respectfully submitted,

Daniel J. Popeo
Paul D. Kamenar*
Washington Legal Foundation
1705 N Street, N.W.
Washington, D.C. 20036
(202) 857-0240

*Counsel of Record

Date: March 2, 1989

MOTION FILED
JAN 25 1989

(7) (3)

Nos. 88-902 and 88-929

In The

Supreme Court of the United States

October Term, 1988

JOHN A. BERSANI, NEWPORT GALLERIA GROUP, ROBERT J. CONGEL, and the PYRAMID COMPANIES,

v. *Petitioners,*

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,

Respondents.

JOSEPH ROBICHAUD AND CITIZENS IN SUPPORT OF ATTLEBORO MALL,

v. *Petitioners,*

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF OF PACIFIC LEGAL FOUNDATION, RESOURCE DEVELOPMENT COUNCIL FOR ALASKA, INC., CALIFORNIA CHAMBER OF COMMERCE, AND THE CALIFORNIA FARM BUREAU FEDERATION IN SUPPORT OF PETITIONERS AND BRIEF AMICUS CURIAE

Of Counsel

KATHLEEN A. WEEKS
Pacific Legal Foundation
807 G Street, Suite 200
Anchorage, AK 99501
Telephone: (907) 278-1731

RONALD A. ZUMBRUN
*ROBIN L. RIVETT
JAMES S. BURLING
*Counsel of Record
Pacific Legal Foundation
2700 Gateway Oaks Drive
Suite 200
Sacramento, CA 95833
Telephone: (916) 641-8888

Attorneys for Amici Curiae

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

28pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES CITED iii

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF OF PACIFIC LEGAL FOUNDATION, RESOURCE DEVELOPMENT COUNCIL FOR ALASKA, INC., CALIFORNIA CHAMBER OF COMMERCE, AND THE CALIFORNIA FARM BUREAU FEDERATION IN SUPPORT OF PETITIONERS 1

INTERESTS OF AMICI CURIAE 2

NEED FOR ADDITIONAL ARGUMENT 4

AMICUS CURIAE BRIEF OF PACIFIC LEGAL FOUNDATION, RESOURCE DEVELOPMENT COUNCIL FOR ALASKA, INC., CALIFORNIA CHAMBER OF COMMERCE, AND CALIFORNIA FARM BUREAU FEDERATION 6

INTERESTS OF AMICI 7

OPINIONS BELOW 7

STATEMENT OF THE CASE 7

SUMMARY OF ARGUMENT 9

INTRODUCTION 9

ARGUMENT 10

I. THE MARKET ENTRY THEORY INTERPRETATION OF 40 C.F.R. § 230.10(a) CONFLICTS WITH SECTION 404 OF THE CLEAN WATER ACT 10

A. The Purpose of the Clean Water Act Is to Clean Up the Nation's Waters 10

B. Section 404 of the Clean Water Act Allows Discharge of Filled or Dredged Material into the Nation's Waters if There Is No Unacceptable Adverse Effect on the Environment 11

TABLE OF CONTENTS–Continued

Page

C. EPA's Finding of the Unacceptable Adverse Impact Is Not Supported by the Record 12

D. EPA's Market Entry Theory Provides No Meaningful Standard..... 14

E. The Market Entry Theory Fails to Protect the Nation's Water and Wetlands, and in Fact Ignores This Factor..... 15

II. THE SECOND CIRCUIT'S DECISION SANCTIONING A STANDARDLESS MARKET ENTRY APPROACH TO THE IMPLEMENTATION OF 40 C.F.R. § 230.10(a) DESTROYS PROPERTY RIGHTS..... 18

CONCLUSION 23

TABLE OF AUTHORITIES CITED

Page

CASES

Buttrey v. United States, 690 F.2d 1170 (5th Cir. 1982), *cert. denied*, 461 U.S. 927 (1983) 10

City of Angoon v. Hodel, 803 F.2d 1016 (9th Cir.), *cert. denied*, 108 S. Ct. 197 (1984) 19, 20

Morton v. Ruiz, 415 U.S. 199 (1974) 15

STATUTES

33 C.F.R. § 230 20

§ 320.4 (1987) 8, 14

33 U.S.C. § 1251(a) (1976) 10

§ 1344(a) (1982) 11

§ 1344(b) 11

40 C.F.R. § 230 ..... 8, 14

§ 230.10(a) (1987) ..... *passim*

§ 231.2(e) 12

Clean Water Act, § 404 ..... *passim*

§ 404(a) 11

§ 404(b)(1) 8, 11

§ 404(c) 12, 13

RULE

Supreme Court Rule 36 2

LEGISLATIVE HISTORY

3 Legislative History of the Clean Water Act of 1977, 95th Cong. 2nd Sess. 532 (1978) 10

Nos. 88-902 and 88-929

In The

Supreme Court of the United States

October Term, 1988

JOHN A. BERSANI, NEWPORT GALLERIA GROUP, ROBERT J. CONGEL, and the PYRAMID COMPANIES,

v. *Petitioners,*

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,

Respondents.

JOSEPH ROBICHAUD AND CITIZENS IN SUPPORT OF ATTLEBORO MALL,

v. *Petitioners,*

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF OF PACIFIC LEGAL FOUNDATION, RESOURCE DEVELOPMENT COUNCIL FOR ALASKA, INC., CALIFORNIA CHAMBER OF COMMERCE, AND THE CALIFORNIA FARM BUREAU FEDERATION IN SUPPORT OF PETITIONERS

This motion of Pacific Legal Foundation (PLF), Resource Development Council for Alaska, Inc. (RDC), California Chamber of Commerce (CCC), and California Farm Bureau Federation (CFBF) to file the annexed amicus curiae brief is respectfully made pursuant to Supreme Court Rule 36.

Consent to the filing of this brief has been granted by all parties except for respondents, Sierra Club, *et al.* Copies of consent letters have been lodged with the Clerk of this Court.

INTERESTS OF AMICI CURIAE

PLF is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of litigating in the public interest. PLF has litigated numerous public interest cases which involve environmental issues in general and the interpretation of the Clean Water Act (CWA) in particular. PLF policy is set by a Board of Trustees composed of concerned citizens, the majority of whom are attorneys. The Board authorizes active PLF involvement in a case only when there is broad community support. PLF's Board of Trustees has authorized the filing of an amicus curiae brief in this matter.

RDC is a nonprofit organization made up of thousands of Alaskans and Alaska business associations, labor unions, native regional and village corporations, and 26 local government units. All of these interests have come together to work for the responsible development of Alaska. RDC deals with a variety of issues that are

important to the economic prosperity of Alaska and recognizes that one of the most formidable roadblocks to development in Alaska is the federal government's land use policies and regulations. RDC has participated in numerous lawsuits and countless administrative hearings on land use and development in Alaska. RDC has a very distinctive perspective on the Environmental Protection Agency's (EPA) interpretation of 40 C.F.R. § 230.10(a) (1987), regarding the market entry theory for implementation of the practicable alternatives test. This theory was approved by the court below. In Alaska almost all of the land would be covered by only two market entry dates: (1) 1958, the year of statehood when the state government began selecting its 104 million acres from Alaska's total land area of 375 million acres, and (2) 1971, when Congress settled the long contested rights of Alaska Natives by granting them the right to select 44 million acres of federal land in Alaska. Prior to those dates the federal government owned over 99% of Alaska. RDC strongly believes the market entry theory, as interpreted by EPA, could end responsible development in Alaska inasmuch as over 70% of Alaska is wetland by EPA's definition. The lower appellate court's sanction of EPA's market entry theory will have a devastating impact on Alaska which RDC believes was never intended by Congress in passing the Clean Water Act.

The California Farm Bureau Federation is a volunteer, nongovernmental, nonprofit, California corporation. Its primary purpose is to protect and foster agricultural interests throughout the State of California. Its members consist of 52 county farm bureaus, with a combined membership at the close of its 1984 membership year of

approximately 98,000 farm families. Over 85% of all commercial farmers in the State of California are members of county farm bureaus. Members, many of whom farm and/or raise cattle throughout the United States and engage in wetlands agriculture will be negatively affected by EPA's market entry theory. The theory will reduce the acreage available for new crop production and will undoubtedly impinge upon the farm and ranch management decisions regarding what crops to plant, when to plant them, and where to plant them.

The California Chamber of Commerce is a broad-based, nonprofit organization through which business, industry, and agriculture join forces to work for positive action on key legislative, regulatory, and legal issues affecting California's economic and job climate. Chamber positions on issues are set by a board of directors, based on recommendations from statewide committees and task forces. Committee and task force members are volunteers with an interest or expertise in the subject. The chamber's members who are developers as well as the members who are farmers and ranchers will be negatively impacted by EPA's market entry theory. It establishes a standardless inquiry that virtually invites arbitrary and unequal application, and makes no sense in the real world of land use planning, financing, and development. If the market entry theory is not overturned by this Court, the chamber's members will be significantly and negatively impacted.

NEED FOR ADDITIONAL ARGUMENT

The Second Circuit Court of Appeals has rendered an interpretation of 40 C.F.R. § 230.10(a), implementing

Section 404 of the Clean Water Act, which not only fails to fulfill the statute's main purpose, but also severely and unnecessarily impacts development and agricultural interests nationwide. This interpretation called the market entry theory, has been discussed so far in an isolated, sterilized manner without a true indication of its potentially broad precedential impact. It is necessary for this Court to recognize how broad the impact of this decision may be in order to understand how it seriously conflicts with the purposes of the Clean Water Act. Unless the amici curiae applicants are permitted to file the annexed brief, it is unlikely that these critical precedential impacts will be brought to the attention of the Court.

For these forgoing reasons, Pacific Legal Foundation, RDC, CCC, and CFBF request that this motion to file the annexed amicus curiae brief be granted.

DATED: January 3, 1989.

Respectfully submitted,

RONALD A. ZUMBRUN
*ROBIN L. RIVETT
JAMES S. BURLING
*Counsel of Record
Pacific Legal Foundation
2700 Gateway Oaks Drive
Suite 200
Sacramento, CA 95833
Telephone: (916) 641-8888

Of Counsel

KATHLEEN A. WEEKS
Pacific Legal Foundation
807 G Street, Suite 200
Anchorage, AK 99501
Telephone: (907) 278-1731

By _____
ROBIN L. RIVETT

Attorneys for Amici Curiae

Nos. 88-902 and 88-929

In The

Supreme Court of the United States

October Term, 1988

JOHN A. BERSANI, NEWPORT GALLERIA GROUP, ROBERT J. CONGEL, and the PYRAMID COMPANIES,

v. *Petitioners,*

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,

Respondents.

JOSEPH ROBICHAUD AND CITIZENS IN SUPPORT OF ATTLEBORO MALL,

v. *Petitioners,*

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

AMICUS CURIAE BRIEF OF PACIFIC LEGAL FOUNDATION, RESOURCE DEVELOPMENT COUNCIL FOR ALASKA, INC., CALIFORNIA CHAMBER OF COMMERCE, AND CALIFORNIA FARM BUREAU FEDERATION

INTERESTS OF AMICI

The interests of amici curiae are set forth in the preceding motion for leave to file this brief.

OPINIONS BELOW

The opinion of the United States Court of Appeals is cited as *Bersani v. Robichaud*, 850 F.2d 36 (2d Cir. 1988).

STATEMENT OF THE CASE

John A. Bersani and the Pyramid Companies (Pyramid) began to search for a shopping center site in the Attleboro, Massachusetts, area in September, 1983. They found an undeveloped site owned by the Edward J. DeBartolo Corporation (DeBartolo), another shopping center developer, who had purchased the site in April, 1982. On the site are wetlands known as Sweedens Swamp. DeBartolo undertook to develop the site and had applied to the Massachusetts Department of Environmental Quality Engineering (DEQE) for a state wetlands permit, but it was denied in April, 1982. Pyramid acquired the site from DeBartolo in December, 1983, and proceeded to obtain all permits necessary to build except for the Section 404 dredge and fill permit. Although DEQE's permit standards were modified in April, 1983, Pyramid was able to obtain the state wetlands permit under the previous standards, apparently benefiting fortuitously from the fact that DeBartolo had initiated the state wetlands permit process prior to the changes.

When Pyramid sought its Section 404 permit it was faced with its last regulatory hurdle. It has found this hurdle virtually unscalable. The Army Corps of Engineers (Corps) applied the Section 404(b)(1) guidelines (40 C.F.R. § 230) and public interest review regulations (33 C.F.R. § 320.4 (1987)) and found the project met all requirements for a Section 404 permit. As part of the analysis the Corps had found that 40 C.F.R. § 230.10(a) was satisfied. This regulation, providing the critical issue in this case, forbids the Corps from issuing a permit if a "practicable alternative" *is* available to the applicant that "would have less adverse impact on the aquatic ecosystem." 40 C.F.R. § 230.10(a). The only other shopping mall site in Attleboro had been optioned by another mall developer (New England Development Company (NED)) on July 1, 1983, eliminating the last practicable alternative.

The Corps notified EPA on June 28, 1985, of its intentions to issue the permit. In response EPA determined that Pyramid had not complied with the practicable alternatives requirement of 40 C.F.R. § 230.10(a), and blocked the permit. It made this finding by inventing a new "market entry theory" for the regulation. Rather than considering practicable alternatives available at the time of the Section 404 permit was applied for, EPA changed this long-standing practice of the Corps and determined availability should be considered as of the time the applicant "entered the market." EPA then ruled that Pyramid must have entered the market before NED optioned the alternate mall site and therefore regardless of the wetlands mitigation measures agreed to by Pyramid, measures which would have created a significantly more

valuable wetland area, Pyramid was not entitled to its Section 404 permit. This litigation followed.

SUMMARY OF ARGUMENT

The purpose of Section 404 of the Clean Water Act which is to clean up the nation's water is circumvented by EPA's interpretation of 40 C.F.R. § 230.10(a). This regulation requires the Corps of Engineers to deny a Section 404 permit if practicable alternatives to a project exist which will have less impact on the aquatic ecosystem. EPA has created a market entry theory in analyzing whether "practicable alternatives" to the proposed project exist. This theory establishes an amorphous standard which is not only arbitrary and fails to further the goals of the Clean Water Act, but also severely impacts private property rights. None of these results were intended by Congress.

INTRODUCTION

This case involves an issue far more important than one developer trying to cope with one federal agency's overzealous, arbitrary enforcement of its regulations. Rather, it involves the fate of farmers, ranchers, miners, and developers throughout the nation who are being harmed by a federal agency and who will be injured even further if EPA's "market entry theory" for implementation of 40 C.F.R. § 230.10(a), as sanctioned by the Second Circuit, is allowed to stand. EPA has crossed a line drawn by Congress designed to balance the biological integrity

of a specific wetland area against productive development advantages that a site would provide. *See Bersani v. Robichaud*, 850 F.2d at 48 (Pratt, J., dissenting). Instead of focusing on effects of developing wetlands and significant mitigation measures which could be required of the developer to insure that on balance wetlands are preserved and maintained, EPA has focused on who is doing the developing. This focus is the unfair and arbitrary result of the market entry theory, whereby the particular land which is the subject of the Section 404 permit application is not examined but the party who wishes to develop the land is. The result has nothing to do with maintaining the biological integrity of the nation's waters and is completely contrary to the intent of the Clean Water Act.

ARGUMENT

I

THE MARKET ENTRY THEORY INTERPRETATION OF 40 C.F.R. § 230.10(a) CONFLICTS WITH SECTION 404 OF THE CLEAN WATER ACT

A. The Purpose of the Clean Water Act Is to Clean Up the Nation's Waters

"Section 404 of the Clean Water Act was enacted 'to restore and maintain the chemical, physical, and biological integrity of the nation's waters.' 33 U.S.C. § 1251(a) (1976) (Section entitled Congressional Declaration of Goals and Policy)." *Buttrey v. United States*, 690 F.2d 1170, 1180 (5th Cir. 1982), *cert denied*, 461 U.S. 927 (1983). *See also* 3 Legislative History of the Clean Water Act of

1977, 95th Cong., 2nd Sess. 532 (1978). This purpose in mind, it is clear that "EPA went wrong–seriously wrong–when it adopted the market entry theory to decide whether an alternate development site was available. By focusing on the decision making techniques and tactics of a particular developer instead of the actual alternatives to disturbing the wetland, EPA ignored the statute's (Clean Water Act) central purpose." *Bersani*, 850 F.2d at 48 (Pratt, J., dissenting). That purpose of course is to protect the biological integrity of the nation's waters and not to guard against decision making techniques and tactics of property owners.

B. Section 404 of the Clean Water Act Allows Discharge of Filled or Dredged Material into the Nation's Waters if There Is No Unacceptable Adverse Effect on the Environment

Section 404(a) of the Clean Water Act authorizes the Secretary of Army, acting through the Corps of Engineers, to issue permits for the discharge of dredged or fill materials. 33 U.S.C. § 1344(a) (1982). Section 404(b) provides that the Corps must base its decisions regarding permits on guidelines to be developed in concert between EPA and the Secretary of Army (meaning the Corps of Engineers). 33 U.S.C. § 1344(b). 40 C.F.R. § 230.10(a) is part of the Section 404(b)(1) guidelines and covers non-water dependent activities. These are activities that could be performed on nonwetlands sites just as successfully as on wetlands sites. This section reads, at Subsection (a):

> "Except as provided under Section 402(b)(2), no discharge of dredged or fill material shall be permitted if there *is* a practicable alternative to the proposed discharge which would have less adverse impact on

> the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences." (Emphasis added.)

Subsection (a)(2) states that

> "an alternative is practicable if it is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes. If it is otherwise a practicable alternative, an area not presently owned by the applicant which could reasonably be obtained, utilized, expanded or managed in order to fulfill the basic purpose of the proposed activity may be considered."

Subsection (a)(3) goes on to indicate that a site is to be presumed available if the activity proposed could occur on uplands just as well as it could on wetlands unless the applicant clearly demonstrates otherwise. The subsection also presumes that activities on upland sites have less adverse impact on the aquatic ecosystem unless it is also clearly demonstrated otherwise.

C. EPA's Finding of the Unacceptable Adverse Impact Is Not Supported by the Record

EPA of course engaged in a practicable alternatives analysis of the Attleboro Mall site pursuant to 40 C.F.R. § 230.10(a). EPA determined that a practicable alternative did exist and therefore it naturally followed that an unacceptable adverse effect on the environment, and in particular wildlife, per the criteria of 40 C.F.R. § 231.2(e) existed. Accordingly, EPA vetoed the 404 permit pursuant to its Section 404(c) veto authority. *See Bersani,* 850 F.2d at 40. EPA's articulation that its veto was due to an unacceptable risk on wildlife was clearly an attempt to

justify its veto by bringing it within the confines of its jurisdictional authority. However, the record discloses that the only basis for EPA's decision to deny the permit was "(1) the avoidability of the loss of wildlife habitat (meaning only that there was a practicable alternative), and (2) the significance of such areas in Massachusetts (meaning that the cumulative impact of this loss and losses at other unrelated wetland sites, far away from Sweedens Swamp, was an important factor in denying their permit)."[1] Robichaud's Petition for Writ of Certiorari at 6. Thus, by invoking the market entry theory to the practicable alternatives analysis of Section 230.10(a) EPA and the Second Circuit read out of the regulation not only its commonsense meaning but also eliminated other considerations to be evaluated during the permit process. First, they lost sight of the regulation's plain meaning that the Corps is to determine whether there *is* a practicable alternative, not whether there was or will be. Second they read out of the regulation its requirements to balance permit decisions on a number of environmental and

---

[1] On the same date that Bersani filed his petition for writ of certiorari, Joe Robichaud and Citizens in Support of Attleboro Mall filed a similar petition of writ for certiorari. Robichaud argues that EPA has exceeded its Section 404(c) statutory authority when it vetoed the Attleboro Mall Section 404 fill permit on the basis of the cumulative loss of wetlands regionally or nationwide, rather than basing its decision on the environmental effects at the specific proposed site in question. Amici curiae fully support the position of petitioner, Robichaud, *et al.*, and adopts Robichaud's argument concerning the limits to which the EPA administrator can consider cumulative impacts when making a Section 404(c) veto.

other factors. 40 C.F.R. § 230; 33 C.F.R. § 320.4. Instead, as Judge Pratt stated: "[T]he market entry theory in effect taints a particular developer with respect to a particular site, while ignoring the crucial question of whether the site itself should be preserved." Instead of considering the significant environmental and economic and social benefits that would occur were the Pyramid partners able to go forward with Attleboro Mall, EPA established a brand new test for finding an unacceptable adverse impact.

D. EPA's Market Entry Theory Provides No Meaningful Standard

EPA established a new test for "practicable alternatives" which fails to provide any meaningful standard. The test may be that if, at any time during your ownership of a particular property or during the ownership of the property by your predecessor assuming some form of privity between you and that previous owner, there was some available, practicable alternative site to the one you now propose to develop, you categorically are not entitled to a Section 404 permit. Could this be the standard? Possibly, since the Court did say that since the North Attleboro site indisputably was "available when Pyramid's predecessor, DeBartolo, purchased Sweedens Swamp, one might argue, as EPA does, that Pyramid should be held to stand in its predecessor's shoes." *Bersani,* 850 F.2d at 41. But the court intimated as well that this may *not* be the standard. In trying to pin the standard down Pyramid asked a series of questions. Is the developer to seek alternative sites from the time of the first internal memorandum on a proposal to develop,

or when you first hire your land use consultant, or when you begin to negotiate for a particular site? *See Bersani*, 850 F.2d at 46. The court responded to those inquiries from *Pyramid* by stating "we are persuaded, however, that EPA is correct in asserting that it is unnecessary to pin down the standard to such a degree and that it would confuse things further to attempt to do so." *Bersani*, 850 F.2d at 46. To the contrary, what has been created is not an objective, fair standard, but an amorphous guideline under which no property owner's or developer can be certain as to whether or not he is complying with Section 230.10(a). Such a standard completely violates all precepts of fairness and property owners' due process rights. *See Morton v. Ruiz*, 415 U.S. 199 (1974).

E. The Market Entry Theory Fails to Protect the Nation's Water and Wetlands, and in Fact Ignores This Factor

The Second Circuit majority sees no problem in their market theory because it believes that the critical purpose of Section 404 is to provide an incentive to avoid developing in wetlands areas. The court reasoned that to choose some objective standard for delineating when the practicable alternatives test should be applied would not provide this incentive. But as the dissent aptly pointed out, Section 404 of the Clean Water Act is not a punitive section. It is not to provide an incentive to avoid choosing wetlands but rather the statute is directed towards maintaining the biological integrity of the nation's waters. To achieve this goal the statute calls for balancing the environmental and biological factors of the specific area against the economic, and social considerations of using

the site. *Bersani*, 850 F.2d at 40. With regard to the site at Sweedens Swamp, the area has been a degraded eyesore for years. As stated by petitioners, Robichaud, *et al.*, "Sweedens Swamp as it presently exists is a highly degraded, highly inefficient wetlands which fails to perform most of the ecological or recreational benefits which make wetlands worth preserving." Robichaud petition at 4. *Robichaud* carefully established the numerous benefits that would accrue to the environment as well as to the public at large were the project allowed to go forward. The petition cites at 4 the following:

> "In addition to extensive on-site mitigation, Pyramid informed the U.S. Army Corps of Engineers, the permitting authority, that it would construct over 35 acres of diverse, productive wetlands on an off-site parcel of land which presently is of very low ecological value. Thus, in addition to improving the wetland habitat which will be provided in the 26 acres of enhanced wetland which will remain after construction, Pyramid has agreed to create an *additional* 36 acres of wildlife habitation consisting of open water, marsh meadow, and shrub swamp.
>
> . . . .
>
> "The Corps found that Pyramid's off-site wetlands creation plans would result in a substantial improvement in overall wildlife habitat for the area. The Corps noted that Sweedens Swamp is a red maple swamp, a very common wildlife habitat in Massachusetts. By contrast the open water, marsh meadows and shrub swamp to be created by Pyramid is a relatively rare type of habitat in the Northeast. As a result, the off-site wetlands will attract animals whose presence in Massachusetts is limited severely by available habitat.
>
> "On balance, after exhaustively analyzing the degraded state of Sweedens Swamp and the millions

> of dollars of improvements to be made by Pyramid, both on-site and off-site, the Corps finally concluded that Pyramid's purported project would result in a net *benefit* to the environment by an order of magnitude of 1 1/2 to 1. The Corps found that Pyramid's proposal would result in a more efficient, functioning wetlands that would actually clean the water entering it, provide meaningful fisheries habitat, and provide for rarer and more endangered wildlife." (Emphasis in original.)

EPA's market entry theory, however, totally ignores this balancing analysis and gives no weight to water or wetlands protection. Instead a developer will be denied a permit on a specific site if a practicable alternative site was available at some time previous to his application for a Section 404 permit, a time undesignated by EPA, during which he had some inkling of developing that particular site or his predecessor had some inkling. But as Judge Pratt indicates, this theory does not protect the biological integrity of the waters, the swamp, or the land. Instead, this theory only punishes the present developer by denying him a Section 404 permit. Yet any future developer who has had no privity with the present developer, and was not looking for a site to develop at the time any practicable alternatives were available, could now develop the property under the market entry theory and obtain a Section 404 permit to do exactly what Pyramid proposed to do. This result is a distortion of the goals of the Clean Water Act. Clearly, what EPA has developed is not a means to promote water quality, but a scheme to stop development and growth. What will happen, of course, is that businesses which need to anticipate costs

to operate profitably won't be able to with the unpredictable standards of the market entry theory. As a consequence businesses may avoid an area like Attleboro and as a result, degraded eyesores like Sweedens Swamp, which provide no benefit and serve merely as breeding grounds for mosquitoes, won't be cleaned up, and wetlands enhancement and improvement won't occur. The Court must not allow such an unintended consequence to go unreviewed.

II

THE SECOND CIRCUIT'S DECISION SANCTIONING A STANDARDLESS MARKET ENTRY APPROACH TO THE IMPLEMENTATION OF 40 C.F.R. § 230.10(a) DESTROYS PROPERTY RIGHTS

Farmers, ranchers, miners, and developers, indeed all people who seek to put even their marginal wetlands property to productive use are jeopardized by the Second Circuit's *Bersani* decision. Even though states such as California, Oregon, and Washington have significant land masses which have been or could be classified by the Corps of Engineers and EPA, rightly or wrongly, as wetlands, the best classic example of this jeopardy can be found in Alaska.

Over 70% of Alaska is "wetland," by EPA's definition, even though the arctic gets less rain than California's Mojave Desert. In the arctic's brief summer the land is spotted with bogs because the snows of the preceding winter melt all at once and a subsurface permanent layer of ice covered permafrost prevents both drainage and absorption. Substantially all Alaskan land is owned by other than conventional private ownership. The federal

government still owns 60%; the state government owns or will own (after its selection process is complete) 28%; the native corporations will eventually own nearly 12% with the small residue in private ownership.

Thus, in Alaska, virtually any private or Native land sought to be developed has a very good chance of being characterized as wetlands. If EPA's interpretation and enforcement of its market entry theory is not overturned, there is an equally good chance that this same land will be met with a virtually insurmountable barrier to productive use, and once again Native land will bear the brunt of an antidevelopment ethic.

Despite the fact that Congress approved and ordered the transfer of 44 million acres to Alaskan Native corporations in settlement of their aboriginal rights, the Native use of land has repeatedly been stopped. For example, Shee Atika, Inc. (Shee Atika), an Alaska Native village corporation, selected 23,000 acres in the southwest portion of Admiralty Island. Environmental groups (Sierra Club, etc.) opposed any use of this land. In an effort to compromise, Shee Atika agreed to exchange its land on the southwest of the island for land on the northwest which was rated environmentally less sensitive by the United States Forest Service. Congress approved the exchange. Alaska National Interest Lands Act (ANILCA), Section 506(c), 94 Stat. 2371, 2409; history reviewed in *City of Angoon v. Hodel*, 803 F.2d 1016, 1018 n.1 (9th Cir.), *cert. denied*, 108 S. Ct. 197 (1984). But when Shee Atika applied for a Section 404 permit for a log transfer facility the legal battle began, eventually going twice to the Ninth Circuit.

The argument before the Ninth Circuit was that the practical alternatives the Corps of Engineers was required to consider prior to issuing any permit included *any land* Shee Atika could exchange its own land for! Even though all the land available for exchange was owned by the federal government and would have required congressional approval, the federal District Court considered that a "practical alternative." In reversing the District Court, the Ninth Circuit held that in selecting alternatives to the applicant's proposal the pertinent regulations require the Corps to consider the applicant's purpose and not just a broad generic public purpose. *Id.* at 1021; *see also* 33 C.F.R. § 230, Appendix B(11)(b)(5)(b). Holding that it was error to make a "broad social interest" the exclusive purpose and need, the Ninth Circuit stated that "when the purpose is to accomplish one thing, it makes no sense to consider the alternative ways by which another thing might be achieved." *Id.* at 1021.

This decision, *City of Angoon v. Hodel*, is applicable to the facts in *Bersani* but is in direct conflict with the Second Circuit's *Bersani* decision. The *Angoon* case discourages soothsaying and "endless speculation." It also directs the permitting agency to apply the purpose of the statute to the project *as proposed* by the applicant. The court ruled that the scope of alternatives the applicant must consider need focus only on the safest, cleanest way to accomplish applicant's purpose which was to remove logs from Admiralty Island. *Id.* at 1021. On the other hand the *Bersani* case requires the Corps not only to investigate as viable alternatives any land available at the time of the permit application but also any land that was

available when either the applicant or his predecessor in title entered the market. Thus endless speculation is sanctioned. The case also sanctions eliminating from consideration development designs and wetland mitigation measures which promote the Section 404 goal of protecting the nation's waters by ignoring the project parameters of the Section 404 applicant.

In Alaska, the *Bersani* ruling may mean that all of Alaska must be considered an alternative site. If the State of Alaska needs to apply for a Section 404 permit, the state entered the market first in 1958 (when it was born as a state) and it could have chosen land in any area not specifically reserved by the federal government. The same argument would apply to Native corporations and the results would be the same. Development would *not* occur until alternatives back to the time of selection are evaluated and proven not to be practicable. And make no mistake about it, many special interest groups would seize upon this market entry theory and use it not to keep the nation's water clean, but to stop growth of any kind.

As a specific example, the market entry theory could be employed by opponents of placer mining. A placer miner works in the general vicinity of streams, and thus is usually working within wetlands areas. For the last few years the placer mining industry in Alaska has been defending a number of lawsuits to shut down placer mining. Armed with a new interpretation of 40 C.F.R. § 230.10(a), it takes very little imagination to think of the next legal attack on placer miners. The argument will be that when a miner began exploring (some have been at it for decades) there were thousands of acres of uplands where gold could have been and in fact has been found.

The miners' opponents will probably argue that uplands were, have been, and are practicable alternative mining sites to stream side sites and consequently, no Section 404 permits should issue per 40 C.F.R. § 230.10(a). Such a result, while it may seem attenuated and outlandish, is really no more so than the *Bersani* result, and may be even less so. In Alaska there are at least alternative sites. In *Bersani*, when the Section 404 application was made, there were no longer any alternative sites, yet Pyramid was denied its permit.

The extrapolation of *Bersani* need not stop here either. Consider the farmer who purchased a farm 30 years ago, part upland acreage and part wetland acreage. After years of letting the wetlands lie fallow, even if economics now require that he farm it, he will be told that he need not bother to seek a Section 404 permit. Why? Because there undoubtedly was upland farming land for sale and available when he bought his wetlands.

Obviously such a standard, which would then allow a new farmer to apply for the Section 404 permit if he purchased the original farmer's wetlands, is illogical and not within the contemplation of the Clean Water Act. Moreover, this interpretation of 40 C.F.R. § 230.10(a) defies common sense. As Judge Pratt recognized it "approaches a sensitive environmental problem through a time warp . . . ignores the statute's basic purpose, and . . . creates unfair and anomalous results." *Bersani*, 850 F.2d at 48. Congress would never have intended such a result and to attribute such intent to Congress is legal error which demands correction.

CONCLUSION

EPA's new market entry theory reinterpreting the practicable alternatives test of 40 C.F.R. § 230.10(a) doesn't make sense. In the context of this case the theory does not protect wetlands. Any new developer without a relationship to Pyramid will be entitled to a Section 404 permit for the Sweeden's Swamp site. In the context of achieving the Clean Water Act's goal of cleaning up the nation's waters, EPA's theory achieves no cleanup but rather substitutes a goal not of stopping wetlands damaging development, but of stopping a particular developer's development. In the context of the broad precedential effect that the Second Circuit's approval of EPA's theory will have, wetlands property owners everywhere will be faced with uncertainty and unpredictability as to what point in time they must show no practicable alternatives exist. Such unreasonable speculation will be required regardless of how much wetlands protection, enhancement, or even creation is agreed to by the property owner to ensure clean waters. Thus farmers, ranchers, miners and developers alike will not know what standard they must meet to obtain a Section 404 permit. This is clearly an unfair, amorphous, and arbitrary regulatory standard which will result in the destruction of private property rights.

The petition for writ of certiorari should be granted.

DATED: January, 1989.

Respectfully submitted,

RONALD A. ZUMBRUN
*ROBIN L. RIVETT
JAMES S. BURLING
*Counsel of Record
Pacific Legal Foundation
2700 Gateway Oaks Drive
Suite 200
Sacramento, CA 95833
Telephone: (916) 641-8888

Attorneys for Amici Curiae

Of Counsel

KATHLEEN A. WEEKS
Pacific Legal Foundation
807 G Street, Suite 200
Anchorage, AK 99501
Telephone: (907) 278-1731